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BY

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"Δεῖ καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα τό τ'ὀρθῶς ἔχον ὀφθῇ κ τὸ χρήσιμον."—Arist. *Pol.* II. 1.

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LIBEL UPON THE DEAD AND THE BATH CLUB CASE.

[*Contributed by* F. P. Walton, Esq., LL.D.]

In the Bath Club case, tried on July 13 and following days by Mr. Justice Horridge and a special jury, no question as to the law of libel upon the dead had to be considered. The only matter in dispute was the amount of damages which the plaintiff had sustained by his wrongful expulsion from the club.[1]

One may wonder that at this time of day the committee of an important club should need to receive so expensive a lesson in the rudiments of club law. In not giving the plaintiff an opportunity to answer the charges made against him they put themselves hopelessly in the wrong. The learned judge said in his summing-up: "It was a fundamental principle of justice that a man should never be condemned unheard. The committee were placed in a quasi-judicial position, and should have approached the matter free from bias, and have listened to the evidence on both sides. The committee had done nothing of the sort."

The plaintiff in this case had been expelled from the club on the ground that he had published a book containing statements gravely reflecting on the moral character of Mr. W. E. Gladstone, whose son was a member of the club, and that by letters which he had written on the club notepaper in connexion with the matter he had been guilty of conduct injurious to the character and interests of the club.

The offensive statements regarding Mr. Gladstone had been brought to the knowledge of the committee by his son. If it had been possible for the son to bring an action of damages against the person who had injured his father's reputation it may be presumed that this course would have been taken. But the English law refuses to protect the reputation of the dead. As the law has been pithily put by Stephen J., "to libel the dead is not an offence known to our law; the dead have no rights and can suffer no wrongs."[2]

[1] *Wright* v. *Bath Club, The Times*, July 14, 15, 16, 1926.

[2] *R.* v. *Ensor*, 1887, 3 *Times* L.R. 366.

As we shall see later, it is quite possible to admit this and, nevertheless, to give to the living a right of action in respect of a libel on the dead. But the English law goes only a very little way in this direction.

It is a misdemeanour at common law punishable on indictment with fine and imprisonment to write and publish defamatory words of any deceased person, provided it be alleged and proved that this was done with intent to bring contempt and scandal on his family and relations and so provoke them to a breach of the peace.[1]

There is no question here of injury to the dead but solely of injury to the living who have been attacked, in the words of Stephen J., " under the mask of attacking a dead man."

It is universally agreed that there is no civil remedy.[2] The doctrine that no civil action can be brought in respect of an attack on the character of a dead man has been followed in America, in Scotland and in India.[3] The Scots case will be referred to later.

It is hardly necessary to point out how inadequate these rules are. Statements made about the dead of a kind which would be defamatory if they related to living people are, for the most part, found either in serious historical works or in books of gossiping recollections.

It is reasonable enough that the historian should enjoy a large measure of protection and no one would suggest that a historian should be liable to imprisonment for commenting freely on the private life of Nero or Cleopatra. In the Scots case, which will be referred to again, Lord Kincairney said rather cynically : "About the half of history consists of what might be called defamation of the dead." [4]

But when the historian is dealing with men whose children are still living there does not appear to be any good reason why he should enjoy an absolute immunity. As it is, unless it can be proved that under the guise of vilifying the dead his real aim was to humiliate their living relations he goes scot-free. And if every presumption is in favour of a writer whose work is of a sober and serious character, this is by no means the case with regard to the writers of gossip. Piquant stories about well-known men and women are

[1] 5 Rep. 125*a*, Hawkins P.C. 1,542 ; Odgers on Libel, 5th ed. 456.

[2] Odgers on Libel, 5th ed. 23 ; Fraser on Libel, 6th ed. 327.

[3] *Am. and Eng. Encycl. of Law*, 2nd ed., vo. Libel, v. 18, p. 968 ; *Broom* v. *Ritchie*, 1904, 6 Fraser 942 ; *Luckumsey Rowji* v. *Hurbun Nursey*, *Ind.* L.R.5 Bombay 580.

[4] *Broom* v. *Ritchie*, 1904, 6 Fraser 942.

likely to increase the sale of such a work and those who rake about among the scandals of thirty or forty years ago in order to produce an entertaining chronicle are in the habit of recounting many stories which rest upon very doubtful authority. But it is seldom that a writer *intends* to bring contempt on the families of those whose vices and peccadilloes he relates. What he intends to do is to sell his book, and if he can do this he does not care very much either about the reputation of the dead or the susceptibilities of the living.

In fact in nine cases out of ten where defamatory words have been published about a deceased person it is utterly impossible to prove this was done with intent to bring contempt on his family and to provoke them to a breach of the peace.

In *Reg.* v. *Ensor* Stephen J. expressed the opinion that "if the object appeared clearly to be to bring James I into contempt, it would, I think, make no difference whether you said 'James was the son of an adulterous murderess' or 'Mary Stuart was an adulterous murderess.' In cases of libel the intention is everything."[1] But this is a very small concession.

The head-note to that case is quite misleading. It runs: "A libel upon a dead person is not a criminal offence unless it can be clearly proved to have caused injury or annoyance to the living." This goes much further than the judgment of Stephen J. He held, following the judgment of the Court of King's Bench in 1791 delivered by Lord Kenyon in *R.* v. *Topham* (4 T.R. 126), that there is no criminal offence unless the libel on the deceased person was published *with a view* to injure his posterity or to throw scandal on the family or to induce them to break the peace. It is not enough that the libel had a tendency to cause these things; it must have been done with the intention to cause them. The jury must find this intent proved as a fact. They are not entitled to infer it from the terms of the libel.

In *R.* v. *Ensor* the libel was a particularly offensive attack upon a man who had been so much respected in Cardiff that a number of his fellow-citizens had put up a statue of him. The libel, which was in the form of a newspaper article, said in effect that this man's whole life had been a fraud and stated, among other things, that he had "in early life left his country for his country's good." As the sons of the victim were living in Cardiff at the time that the article appeared it would be difficult to imagine a libel more calculated to cause injury to the family of the deceased or more likely

[1] 1887, 3 *Times* L.R. 366.

to induce them to break the peace. In fact the sons duly assaulted the defendant and one count of the indictment alleged that the libel had caused the assault to be made.

After *R.* v. *Ensor* it is clear that criminal proceedings afford no protection in the great majority of cases.

Sir James Fitzjames Stephen, writing later as an author about his charge as a judge in *R.* v *Ensor*, says : " I ought to have added, but I did not do so clearly, that there was no evidence that the defendant wished to provoke the sons of the deceased." [1]

A civil action of damages for libel on a deceased person was brought in Scotland as late as 1904. The action was brought by a widow on the ground that she had suffered damage from a statement published in a newspaper that her husband had committed suicide. The Lord Ordinary (Lord Kincairney) held that there was no right of action and this judgment was affirmed by the Second Division, Lord Young dissenting. Lord Kincairney said that there was no modern instance in Scotland of an action for defamation being sustained at the instance of anybody but the person defamed or his representatives, and that there would be great difficulty in fixing rules for limiting the right of action in such cases if it were admitted that relatives might sue. But neither Lord Kincairney nor, on appeal, the Lord Justice-Clerk Macdonald was prepared to affirm that there might not be circumstances in which such an action would be maintainable. Lord Kincairney said : " Circumstances might be imagined in which such an action might be sustained ; for example, if it were necessary in order to prevent the propagation of a slander." And the Lord Justice-Clerk thought an action would lie " if the aspersion of the deceased injured status or caused pecuniary loss to the living." And he gave as an example a charge made against the deceased which would stamp the plaintiff as a bastard. Lord Young was not satisfied with these reservations and delivered a dissenting judgment expressed with his accustomed vigour. " It is trite law that a widow or children are entitled to compensation for the death of their husband or father through the fault of another. On the same ground I am of opinion that the widow and children of a dead man whose character has been defamed are not only interested to clear the character of the deceased but it is their duty to take such measures as are necessary to clear his character, and to seek *solatium* for the injury done to their own feelings." [2]

[1] *Digest Criminal Law*, 7th ed., 282, note 3.

[2] *Broom* v. *Ritchie*, 1904, 6 Fraser 942.

The reservations made by Lord Kincairney and the Lord Justice-Clerk and the dissenting opinion of Lord Young detract from the authority of *Broom* v. *Ritchie*. It is possible, but not likely, that the question may be reconsidered in Scotland. The tradition of the civil law has some weight there and there is, moreover, one reported case in which such an action has been sustained. That was a case in 1821, in which it is interesting to notice that Jeffrey was counsel for the plaintiff. The plaintiff's father had been slandered by a minister speaking in the pulpit. An action of damages was brought by the father, who died before it came to a conclusion. The action was continued by his son as his representative and the jury awarded one shilling damages. The son brought a second action in his own right. The presiding judge said in his address to the jury: "You are to take this as a substantive and distinct case from the other and are to consider whether the statements were not such as ought to affect and were likely to affect the feelings of a son." The jury awarded £100 damages.[1]

The case is meagrely reported and is treated with scant respect in *Broom* v. *Ritchie*. Custom in such matters carries enormous weight and no other instance of an action for a libel of the dead being sustained was to be found in the Scots reports during the eighty years between *Walker* v. *Robertson* and *Broom* v. *Ritchie*.

There is room for some little doubt about the Scots law of the matter, but the want of any precedent since 1821 in favour of the action, the decision in *Broom* v. *Ritchie* in 1904 and the analogy of the English law make the chance of such an action being sustained in Scotland rather slight.

Taking the English law as settled in the sense of *R.* v. *Ensor*, it is clear that defamation of the dead is perfectly safe except in the quite unusual case in which it is possible to prove the *intention* to attack the living. The Indian Penal Code (art. 499, explanation 1) stereotypes the English law to this effect. The Egyptian Draft Penal Code of 1918, which did not become law, makes it an offence to publish defamatory matter concerning "a dead person, provided that the allegations or statements are of a nature to wound the feelings of his family or other near relatives." This article is supported by references to Tangier Draft Penal Code 1913 and the Sudan Penal Code 408, explanation 1 and 2, neither of which I have at hand. The law as suggested in the Egyptian article seems to me

[1] *Walker* v. *Robertson*, 17 July 1821, 2 Murray's Jury Trials Reports, 508.

reasonable. If it were adopted in England it would at least add a spice of risk to the trade of the scandalmonger.[1]

It is, I suppose, at this time of day hopeless to argue that under the English law the widow or children of a deceased person who had been defamed can claim damages for the moral prejudice they have suffered thereby. Upon grounds of equity I fail to see why such an action should not be maintainable. But, as Salmond says, "The only adequate answer to many claims for damages is the mere *ipse dixit* of the law that no such cause of action is recognized."[2]

In the English law, then, we may take it as settled beyond controversy that for defamation of the dead no civil action can be brought and that a criminal prosecution is maintainable only under conditions which are quite exceptional.

Let us see how the matter stands in France. There defamation of the dead may, according to circumstances, be the foundation of a criminal prosecution or of an action of damages.

The remedy by criminal proceedings is now governed by the *loi sur la liberté de la presse du* 29 *juillet* 1881 (art. 34). This article provides penalties for libels directed against the memory of the dead, but only when the authors of these libels intended to injure the honour or consideration of living heirs.

This at first sight might seem to be identical with the English law, but according to the interpretation which has been put upon it, it differs in this important respect, that the intention to injure the living is sufficiently shown by proof that the defendant knew that what he wrote was calculated to cause prejudice to the heirs.[3] If the writer of the libel did not know of the existence of the heir he would not be liable. The interpretation of the French law has given rise to considerable difference of opinion.[4]

One view was that after art. 34 defamation of the dead was in and by itself no longer a delict. In order that a delict should exist, the injurious language concerning the dead must be combined with an attack upon the plaintiff. This theory however has been

[1] I am indebted to Mr. Clement Gatley for the information, given in a letter to *The Times* of July 30, that s.4 of the Defamation Acts of Queensland and Tasmania defines actionable defamatory matter as "any imputation concerning any person or any member of his family, whether such member of his family be living or dead, by which the reputation of that person is likely to be injured, etc."

[2] *Torts*, 6th ed., p. 10, note l.

[3] Alger, 20 février 1897, Dalloz, 99.1.25.

[4] See Cass. Crim. 29 avril 1897, Dalloz, 99.1.25; Cass. Crim. 10 mai 1900, Dalloz, 1901.1.286.

rejected by the jurisprudence according to which the delict is committed when it appears that the injurious statements concerning the dead caused prejudice indirectly to members of his family.[1]

In the case just mentioned a real person had been described under another name in a novel as committing acts of a discreditable character. It was easy for the people of the locality to recognize the real person behind the mask, and the intention of the writer to injure the children was held to be shown sufficiently by his knowledge of the prejudice which his statements would cause to them.[2]

If we compare the judgment of the Court of Cassation of April 29, 1897, which has just been referred to, with *R.* v. *Ensor*, we see how much wider is the protection given by the French law to the memory of the dead, even if, as is not the case in France, the criminal proceedings afforded the only remedy.

Cases no doubt occur in which it appears plain that there was no intention to injure the family of the person defamed. In one well-known case the publishers of the *Siècle* were acquitted of an intention to injure the widow and son of Colonel Henry by accusations of treason which they had brought against him in a series of articles. But, at the same time, under the excellent French procedure by which a person who claims to have suffered damage by a crime may make himself *partie civile* in the prosecution, it was possible for the same Court to award damages to the widow and child.[3]

Besides the difference in the two laws as to proof of intention to injure the living, the heirs of a person attacked in a newspaper or periodical journal have, in addition to other remedies penal and civil, the valuable *droit de réponse* given by the *loi* of 29 juillet 1881. They can compel the publisher to print a reply to the charge and to publish it gratuitously in the paper unless it be more than double the length of the article to which it is a reply. And this right of reply has been held to exist even when the original statement was a fair account of an historical character containing an imputation calculated to discredit his memory and to compromise the moral patrimony of the family. In order to enjoy the *droit de réponse* there is no need to show any intention on the part of the writer to injure either the dead or the living. In one case General de Bourmont

[1] Crim. Rej. 29 avril 1897, Dalloz, 99.1.25.

[2] Cf. with this case the group of cases under Ch. Réun. 1 mai 1867, Dalloz, 67.1.129; see Dalloz, *Répertoire Pratique*, vo. *Presse-Outrage*, nos. 850 seq.

[3] Paris, 28 mai 1903, Dalloz, 1906.2.266.

had been given as an example of a traitor in reference to his passing over to the enemy before the battle of Waterloo. It was held that the *Petit Journal* was bound to insert an answer made by de Bourmont's grandson to this charge.[1] And in France the Courts may order the publisher of a book which contains a libel on the dead to insert in all copies remaining at his disposition and in all later editions of the book corrections made by the heirs of the person defamed.[2]

But, over and above the protection of the memory of the dead secured in the French law by the Penal Code and by the Press Law of 1881 which we have noticed, a much wider protection is given in France by the civil law in allowing an action for damages. The right of members of the family to sue on the ground that their reputation has suffered indirectly—that the accusation made against the deceased *rejaillit sur les héritiers*—is constantly traced back by French writers and French Courts to the Roman law, and it is worth while devoting a short space to examining this claim.

The passages in the Digest in which this matter is touched upon are in the title *De iniuriis* (Dig. 47, 10), and it must be admitted that they leave a good many questions unanswered. They are taken from Ulpian's Commentary on the Edicts. It may be noted at the outset that in the Roman law it is not said or implied that a dead man can suffer an *iniuria*. What is said is that an *iniuria* directed against a dead man may cause damage indirectly to a living person. When the heir sues, it is *proprio nomine*.[3] Ulpian says that an *iniuria* may be done to a person either through himself or through other persons. It is done through himself when the *iniuria* is directly addressed to a *paterfamilias* or *materfamilias*: it is done through others when it is indirect (*per consequentias*), when it is done to my children or my slaves or my wife or my daughter-in-law: for an *iniuria* affects us if it is done to those who are subject to our *potestas* or are among our loved ones—*qui vel potestati nostræ vel affectui subiecti sint*. And if it should happen that an injury is done to the corpse of a deceased person whose heirs we are or of whose goods we have *bonorum possessio*, we have an action of *iniuria* in our own name, for it concerns our own reputation if an *iniuria* is done to him. So likewise if the good name is attacked of

[1] Crim. 10 mai 1900, Dalloz, 1901.1.137, where see the note of M. Jusserand.

[2] Paris, 17 avril 1858, Dalloz, 60.2.109, Dalloz, *Supp.* vo. *Presse-Outrage*, n. 1024.

[3] See Mommsen, *Strafrecht*, 786. The words in *Inst.* 1.6.1, *ne iniuria defunctus afficiatur*, mean merely that the dead man's reputation may suffer.

the person whose heirs we are. And he goes on to say a little later that when an insult is committed at the funeral or is done to the body of a deceased person it is to be regarded as an insult done to the heir if he has entered upon the succession. If he has not entered it is an insult to the *hereditas* and the claim is acquired by the heir when he makes entry. *Semper enim heredis interest defuncti existimationem purgare* (*Dig.* 47, 10, 3, 4, 6). In a later passage in the same title Paul says: "If the statue of your father which is set up on a monument has been stoned, Labeo says you will not have an action *de sepulchro violato* but an action of *iniuria*" (*Dig.* 47, 10, 27).

And in another place Ulpian says: "I think that a *sponsus* should be allowed the *actio iniuriarum* because an insult done to the woman to whom he is betrothed is a humiliation for him" (*Dig.* 47, 10, 24).

These texts and others in the same title show clearly enough that Roman law admitted the possibility of mediate, or, as they have sometimes been styled, oblique injuries. An insult or outrage done to one person may affect the reputation of another *per consequentias*. Nor is it correct to say that this is a consequence of the Roman *patria potestas*, for Ulpian says our reputation may be affected by an insult either to those who are in our *potestas* or are specially dear to us—*vel affectui subiecti sint.* As we have seen, an insult to the wife affects the husband and an insult done to the *sponsa* affects the *sponsus*. Furthermore, the heir who has entered on the inheritance may sue on his own account for an *iniuria* done to his ancestor.

It was, however, a condition of the right of action that an *animus iniuriandi* existed. If a man insulted a *filiusfamilias* in the belief that he was a paterfamilias, or insulted a woman in the belief that she was a widow when in fact she was a wife, the *paterfamilias* or the husband, as the case might be, could not bring the action (*Dig.* 47.10.18.4).

No doubt the thought which underlies these prescriptions is that between members of the same family the connexion is so close that anything which affects injuriously the reputation of one member must at the same time be an injury to the others. And, very likely, as is suggested by Pernice, the right of action given to a living heir in order that he may vindicate the good name of his ancestor is to prevent the danger of the heir falling himself into discredit as wanting in *pietas* if the *iniuria* were allowed to remain unchallenged. (Pernice, *Labeo*, 2, p. 41.)

No doubt the Roman law carries us a considerable distance in the direction which, as will appear presently, the French law has taken. Such a tag as *Spectat enim ad existimationem nostram si qua ei* (*sc. defuncto*) *fiat iniuria* looks very well in the forefront of a judgment of the Cour de Cassation.[1] But in the Roman law it is clear that the widow could not bring an action for injury to her deceased husband unless she was at the same time directly attacked by the libel. Nor could a daughter, merely as such, bring the action. Nor is it certain that a son, merely in that character, could sue, though he might do so in his capacity as heir.

The general principle that an heir has a right of action in respect of a libel on his ancestor formed part of the stock-in-trade of the old civilians and passages to that effect can be traced back in French writers at least as far as the sixteenth century.

A sixteenth-century book of criminal practice says *Iniuria facta cadaveri non censetur facta defuncto, quia postquam quis est mortuus non potest plus aliquo modo offendi, sed bene dicitur facta heredibus qui propterea proprio nomine habent iniuriarum actionem.*[2]

And in 1607 Domat, after stating that the right to bring an action for an *injure* does not pass to the heirs unless the person insulted had begun the action before his death because if he did not do so he must be presumed to have forgiven the offence, goes on as follows: "But if the insult was offered to the corpse, the memory or the tomb of the deceased the heir is entitled to claim reparation for it, because an insult directed to the memory of him to whom he has succeeded and whom he represents is in a sense an attack upon himself.[3]

And, in Germany, Wissenbach, in his *Disputationes*, published in 1661, simply repeats the Roman texts.[4]

It is not until we come to John Voet, whose Commentaries were first published in 1698, that we find the doctrine of libel on the dead set forth pretty much in the shape in which it is laid down in the recent French decisions. Voet says if the pleasant reputation —*hilaris fama*—of the dead is attacked or reviled, the dead man himself seems to be wronged—*iniuriam pati videtur ipse defunctus*. But he goes on to say that not only heirs but children, in that quality merely, ought to have a right of action, so that if a son has renounced the succession this will not affect his right to sue. The

[1] 1 mai 1867, Dalloz, 67.1.140.

[2] *Prax. crim. quaest.* 107, no. 368 cited by M. Delangle, Dalloz, 67.1.139. See also the references to old writers given by M. Quénault, in Dalloz, 67.1.134, col. 2.

[3] *Supp. au Droit Public*, liv. iii, tit. xi, n. vii, p. 218 of ed. of *Lois Civiles* of 1607.

[4] Ed. 1661, p. 987, *sub finem*.

action, as Voet explains, is not brought in respect of the *iniuria* to the parent, but on the ground that the plaintiff himself has sustained an injury in his own person, " inasmuch as it is no small disgrace to a son if his parent was either a slave, or an unworthy person, or a criminal, and accordingly no slight insult is inflicted upon him by those who calumniously attack the good name of his deceased father by aspersions of such a kind." It will be observed that Voet does not require that there should have been any intention to injure the reputation of the children. According to him their reputation suffers inevitably by the injurious statements concerning their father—*quatenus non modica filii ignominia est, si parentem aut servum, aut indignum, aut sceleratum habeat.* Voet, it is clear, goes considerably further than Labeo and Ulpian.[1]

As regards the French law we have already dealt with the case in which the defamatory statements concerning the deceased person were really aimed at living members of his family.

In France as in England it is not necessary in such a case that the plaintiffs should be mentioned by name. For example, the statement may be that the ancestor acquired a fortune by spoliation and it may be suggested that the heirs are keeping property which ought to be restored to those from whom it was taken in a dishonest way.[2]

But the case with which we are concerned is not this one. It is when the ancestor is defamed and it does not appear that the traducer intended to injure the heirs. Have they in this case a right to claim damages ?

The French law answers this question in the affirmative when the action is brought by a relative of the deceased who can show that he has suffered damage either material or moral by the libel. It is not necessary that he should be the heir of the deceased, and an heir who has renounced the succession is not thereby disqualified from bringing the action. Nor is the right of action limited to persons standing within certain degrees of relationship to the deceased. But unless the plaintiff is nearly related to the deceased it may be difficult for him to prove that he has suffered damage.[3]

In the case where the action is brought by children of the deceased, the proof of moral damage will be in most cases easy

[1] See Melius de Villiers, *Roman and Roman-Dutch Law of Injuries*, p. 66 and p. 72.

[2] Sourdat, *Responsabilité*, 5th ed., n. 61 ; Dalloz, *Rép.*, vo. *Instruction Criminelle*, n. 103, and case cited there. Cf. Cass. *Ch. Réunies*, 1 mai 1867, Dalloz, 67.1.129.

[3] Sourdat, *op. cit.*, n. 72 ; Fabreguettes, *Traité des Délits Politiques*, n. 216 ; Le Poitevin, *Traité de la Presse*, 2, n. 903 ; Crim. 29 avril 1897, Dalloz, 99.1.25 ; Crim. 10 mai 1900, Dalloz, 1901.1.137 ; Paris, 17 avril 1858, Dalloz, 60.2.109 ; Dalloz, *Supp.* vo. *Presse-Outrage*, n. 1024.

enough. The father leaves to his children what has been called *un patrimoine moral* and they have an interest in its being preserved intact.[1] Even a remote relation of the deceased who could not prove that he had suffered damage may be entitled to demand the suppression of statements injurious to the memory of the deceased. In a case concerning the publication of private letters of Benjamin Constant, the Tribunal Civil de la Seine, in admitting an "intervention" on the part of a relative, said: "Seeing that the right of preserving the respect due to the memory of members of a family is a pious duty which belongs incontestably to the relatives of the deceased person, etc."[2]

It must not, however, be thought that French Courts are disposed to restrict freedom of speech beyond what is reasonable. On the contrary, the law is jealous to protect the freedom of the historian or the serious writer. A distinction is drawn between statements made in regard to the public conduct of ministers of State, members of either house of the legislature or public officials, and also statements in regard to the directors or administrators of any industrial, commercial or financial enterprise which appeals to the public for credit on the one hand, and statements made as to the private life of these persons or of any other individuals on the other hand. Statements made as to the public life of a deceased statesman or official, etc., cannot be made the basis of a civil action, and in answer to criminal proceedings in respect of them the defendant is allowed to prove the truth of the statements.[3]

In this case only the proof that the statements made were true is a complete justification. But, on the other hand, where the defamatory statements were in regard to the private life either of public officials or others in the same class, or as to private individuals, it is not permissible to prove the truth of the statements.[4]

But in the case with which we are concerned of statements made about a man who is dead the law admits some modification of these rules. It is admitted that a conscientious man, writing a serious work, ought not lightly to be interfered with. It is in the public interest that we should have faithful accounts of the past, and the historian or the critic who is free from personal

[1] Cass. 15 nov. 1900, Dalloz, 1901.1.137.

[2] Cited by Sourdat, *op. cit.*, 57, n. 2.

[3] *Loi*, 29 juillet 1881, art. 35.

[4] Cass. 18 mars 1889, Dalloz, 90.1.160; Cass. 21 mars 1890, Dalloz, 91.1.495; Alger, 27 février 1894, Dalloz, 94.2.371; Fabreguettes, *Infractions par la Parole*, 2, 1364.

malignity is entitled to favourable consideration by the courts even when he touches upon the private life of individuals.

The fundamental principle of the French law upon the subject is that so long as a man is living, injurious statements concerning his private life are always actionable. *La vie privée doit être murée.* But when the man is dead the situation is altered. If he was a public character, writers are at liberty to give an account of his public conduct and to criticize it and they will not be liable in damages if they have given a true account of the facts. And as to the private life whether of public men or of others the Courts exercise a wide discretion. They take account of the temper and good faith of the writer and of the object with which the disclosures were made. The serious and honest writer is protected by the principle that there is no *iniuria* without *animus iniuriandi.*

It is not enough in such a case to show that the historian has caused damage to the family. It must be shown that he has committed a fault by making statements either intentionally or carelessly which are false. If the court is satisfied of his good faith he is invulnerable.[1]

In France the sons of a deceased statesman whose private character had been attacked would have no difficulty in bringing the matter into a court of justice and the writer would be cast in damages unless he satisfied the court that the statements which he made were true in fact and published without malice. It is interesting to observe that in the Province of Quebec the French rules upon this subject have been followed. The Civil Code there is, of course, based upon the old French law, but in some classes of cases, and particularly in actions of damages for tort, English as well as French cases are frequently cited in the Courts.

In fact the law of libel in that province as it has been shaped by the judicial decisions has been influenced materially by the English law and is now of an eclectic character.

The Criminal Code of Canada admits as a justification the plea that the statements made were true and were published in the public interest (arts. 292, 299). And this principle has been introduced by the judicial decisions into the civil law also.[2] The jury finds the facts from which the public interest is to be inferred, but the question whether the matter is of public interest is for the judge.[3]

Revelations of the private misconduct of persons no longer

[1] See *Trib. de la Seine*, 10 mars 1997, Dalloz, 97.2.135. Le Poitevin, *Traité de la Presse*, 2, n. 903; Sourdat, *Responsabilité*, 5th ed., n. 71 and n. 71 ter.

[2] *Jeannotte* v. *Gauthier*, 28 Canadian Supreme Court Reports 590.

[3] *Graham* v. *Pelland*, 1896, R.J.Q.5 Q.B.196.

occupying or seeking office can hardly be in the public interest. A matter of public interest is by no means synonymous with a matter which interests the public. As a Quebec judge put it: "It is very far from being in the public interest, or, what is the same thing, for the public benefit, to publish a great many things that unfortunately do interest the public very really and evidently, or they would not be published at all."[1]

Even when no public interest is pleaded the defendant may plead the truth or the notoriety of what he has said, not as a justification but in mitigation of damages.[2]

In regard to libel upon the dead the Civil Code of Quebec is silent and there is no statutory law analogous to the French *loi sur la liberté de la presse*, which has been referred to above. But the Courts of Quebec have without hesitation followed the French law in admitting a right of action on the part of relatives of the deceased who can prove that they have suffered moral damage.[3]

In a recent case a statement had been made in a newspaper that a deceased man and woman who had lived together were not married, though they had gone through a form of marriage. It was alleged that the man had formerly been a priest of the Roman Catholic Church and that he could not abandon that quality which was by the law of the Church an absolute impediment to marriage. In an action by a daughter it was held that the statements were defamatory to the memory of the father, and insulting, humiliating and damaging to the plaintiff.[4] No doubt this case might be distinguished on the ground that the statements were a direct libel on the plaintiff as branding her as a bastard. But in the course of his judgment the learned judge reaffirms the law of Quebec that a libel upon a deceased man which injures or humiliates a living descendant entitles the descendant to an action of damages.[5]

On the whole, it seems to me that the French law and the law of Quebec strike a fair balance between the claims of the press or of the historian and the rights of the individual. It is true that the dead have no legal rights. But it is equally true that a son has an interest in the reputation of his father and suffers if it is injured. Is there any adequate reason why this interest should not be protected by the law?

[1] *McDougall* v. *Mason*, 1893, R.J.Q.3 S.C. *per* Johnson, C. J., at p. 172.

[2] *Trudel* v. *Viau*, 1889, Montreal Law Reports, 5 Q.B.502; *Robert* v. *de Montigny* 1890, Montreal Law Reports 6 S.C.345.

[3] *Huot* v. *Noiseux*, 1892, R.J.Q.2 K.B.521; Mignault, *Droit Civil Canadien*, 5, p. 383.

[4] *Chiniquy* v. *Bégin*, 1912, R.J.Q.42 S.C.261, Greenshields J. [5] p. 268.

SOME DIFFERENCES BETWEEN THE ENGLISH AND THE AMERICAN LAW OF SALE OF GOODS.[1]

[*Contributed by* WILLIAM E. MCCURDY, ESQ.]

THE American common law governing sale of goods was in general the same as the English common law, though notable, and, in some instances, fundamental differences existed between the two bodies of law and even between the laws of different American states. Toward the end of the nineteenth century, as part of a general movement favouring codification of commercial law, it was felt desirable both in Great Britain and in the United States that the law governing sale of goods should be set forth in comprehensive statutory form, which should be in the main a declaratory codification—not an enactment of a new body of law. The law of sales was codified in England in 1893, 1894, in the Statute 56 & 57 Vict., c. 71, known as the Sale of Goods Act, drafted by Mackenzie D. Chalmers, later Sir Mackenzie Chalmers. This Act, embracing the whole of the United Kingdom, has been adopted subsequently in most of Canada and in other British Dominions. In the United States the movement toward codification of commercial law was prompted largely by a desire to make uniform the laws of the different states in those subjects in which uniformity is important and which, under the Constitution of the United States, are matters of state control. In such subjects uniformity can be secured only by inducing the several states to adopt the same laws. Since 1891 there has existed a body known as the Commissioners for Uniform State Laws, composed of two or more commissioners appointed by the Governor of each state. This body meets annually, drafts and recommends to the states statutes for enactment. The

[1] The author acknowledges his indebtedness to Professor Samuel Williston for criticism in the preparation of this paper. Acknowledgment is also made to Professor Williston's treatise on *The Law Governing Sales of Goods at Common Law and under the Uniform Sales Act*, hereinafter referred to as Williston on Sales 1st ed. 1909, 1 vol., 1304 pp.; 2nd ed. 1924, 2 vols., 1954 pp. This treatise is recognized as standard authority by the Courts in the United States, and has played an important part in aiding in the uniform construction of the American Sales Act.

original draft of an Act to make Uniform the Law of Sales was prepared by Samuel Williston, Professor of Law at Harvard University, in 1902-3 at the instance of the Commissioners for Uniform State Laws. "It was printed in the summer of 1903 and distributed, with a request for criticism, to teachers of the law of sales, writers and other experts on the subject. Some criticisms were received, and in the light of these criticisms and the draftsman's own further reflections, a revised draft was presented to the Commissioners in the summer of 1904. This draft was gone over section by section at this conference. Doubtful points and proposed changes in wording were carefully considered. A revised draft was again presented in 1905, and with slight changes again in 1906. At the meeting of the Conference at St. Paul (Minnesota) in the summer of 1906, the draft was finally adopted by the Commissioners and recommended for passage."[1] Within a year it had been enacted by six states, and now after twenty years it is law in twenty-seven jurisdictions, including all the important commercial states. The Uniform Sales Act, as it is known, is based on the Sale of Goods Act. The influence of the latter upon the former was of course great, just as has been the influence of the English common law of sales upon the common law of the different states. Since these two statutory enactments cover most of the English-speaking world, Anglo-American law of sale of goods may be said to be uniform to a high degree. The Uniform Sales Act had, however, two objects: first, to codify the existing body of non-statutory principles; and, secondly, to make uniform the law of the several states. Where the law on a particular point varied in the several states, a uniform codification necessarily changed the law of some states. Moreover, those concerned with drafting the American Statute felt that where the existing law, in the light of experience, had shown itself to be inadequate, new rules might be preferred, and consequently on a few points the Commissioners frankly attempted a reform of rules of the common law which seemed at variance with the convenience of business. As a result, there exist some important differences between the English and the American statutes. The purpose of this paper is to point out some of the more fundamental of these differences. In so doing it will be convenient generally to follow the order of the statutes.

Sale, Contract to Sell, Contract of Sale.—No distinction is more fundamental than that between a contract to sell, sometimes spoken

[1] Williston on Sales, preface to the 1st ed.

of erroneously as an executory sale, in which property in goods does not pass, and a sale, sometimes spoken of as a present or executed sale, in which property does pass. There is in use a third phrase, " contract of sale," which comes from the Roman law, where title to goods could not be transferred by mere agreement. The distinction which is essential in our law between a contract which transfers the property immediately and one which does not did not exist in that law, and consequently every bargain might be termed contract to sell (sale) or contract of sale. As used in the English and less frequently in the American books, contract of sale may include either sale or contract to sell, and may be used sometimes in one sense and sometimes in the other. It is therefore ambiguous and confusing. More accurate terminology seems desirable. Although the term " contract of sale " is to be found occasionally before Blackburn's time, his adoption of this term, borrowed from Pothier, is probably chiefly responsible for the currency of the expression. The term is adopted by the Sale of Goods Act, s. 1 (1) : " A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price " ; s. 62 (1) : " ' Contract of sale ' includes an agreement to sell as well as a sale." S. 1 (3) points out the distinction between a sale and an agreement to sell. The Uniform Sales Act throughout (except in s. 75 in defining " future goods ") refrains from using the expression " contract of sale," and instead uses the terms " sale " and " contract to sell." Where the same rule is applicable to both transactions, the rule is laid down specifically for " a contract to sell or a sale." Many rules, however, relate only to one of them.

Conditional Sales.—In the United States the term " conditional sale " has come to mean almost exclusively one thing : If under a contract the possession of the goods is delivered to the buyer and he is given the right to use them, but the seller retains the property in the goods until the price is paid, the transaction is known as a conditional sale. Frequently it is part of the agreement that the price shall be paid in instalments, and the transaction is popularly spoken of as sale on the instalment plan. It is in effect a short device for a sale and a mortgage back. Upon delivery of the goods the buyer is a bailee with more than a contract right ; he is substantially the owner.[1] The property interest of the seller is solely for

[1] Williston on Sales, ss. 7, 53, 73, 330-4 ; *Pinkham* v. *Mattox*, 53, N.H. 600 ; *National Cash Register Co.* v. *South Bay Club House Assoc.*, 64 N.Y. Misc. 125 ;

security purposes. Many difficulties have arisen, however, both in respect to subpurchasers from and creditors of the buyer in possession, and between the seller and the buyer upon the buyer's default.

As respects third persons, the situation is peculiarly deceptive and involves all the vices present when a chattel mortgagor is in possession of the chattel.[1] *Bona fide* purchasers from the buyer should be protected, as should also the buyer's creditors. It is also desirable to permit such transactions and protect the seller. The common law of the United States, except in Louisiana, Illinois, Pennsylvania, and a few other states, protected the seller's title to the full extent. Such a transaction is not possible in Louisiana. In Illinois and Pennsylvania the doctrine of estoppel was applied to protect innocent purchasers from and creditors of the buyer, thus making such transactions impossible except as between the immediate parties thereto. In most states, since the transaction although a mortgage in substance was not a mortgage in form, a conditional sale was held by the Courts not to be within the chattel-mortgage recording Acts. Legislatures in recent years, however, have generally passed special recording statutes for conditional sales. These statutes recognize their validity as between seller and buyer, but make them invalid in respect to certain designated third persons unless recorded. The Sales Act, s. 1, provides that a sale or contract to sale may be absolute or conditional, thus permitting conditional sales without making any particular provisions for them, leaving

Carpenter v. *Scott*, 13 R.I. 477 ; *Dame* v. *Hanson*, 212 Mass. 124 ; *Tweedie* v. *Clark*, 114 N.Y. App. D. 296 ; *Bailey* v. *Baker Ice Co.*, 239 U.S. 268 ; *Smith* v. *Aldrich*, 180 Mass. 367 ; *Whitney* v. *Abbott*, 191 Mass. 59 ; *Haynes* v. *Temple*, 198 Mass. 372 ; *White* v. *Allen*, 133 Mass. 423 ; *Allen* v. *Delano*, 55 Mo. 113 ; *Bunker* v. *McKenney*, 63 Me. 529 ; *Buckmaster* v. *Smith*, 22 Vt. 203.

[1] *Steinert & Sons Co.* v. *Reed*, 118 Me. 403 ; *Cutting* v. *Whittemore*, 72 N.H. 107 ; *Ratchford* v. *Cayuga County Warehouse Co.*, 159 N.Y.App. D. 525 ; *Chicago Ry. Equipment Co.* v. *Merchants Bank*, 136 U.S. 268.

The term " chattel mortgage " is uniformly used in the United States for what seems called in the English books a " conditional bill of sale."

At common law a chattel mortgagor in possession, if the requirement of delivery had been met, could not defeat the mortgagee by a transfer of the property to a subsequent purchaser, nor could the mortgagee be defeated by attaching creditors of the mortgagor. This was an extremely deceptive situation because the mortgagor being substantially and beneficially the owner was apt to deal with the goods as owner to the prejudice of innocent third persons. In the United States the matter has been dealt with by recording statutes. The theory of these in general is that a mortgage of a chattel is valid as between the parties thereto but in respect to designated third persons it is invalid unless either the mortgage is recorded or the mortgagee takes and remains in possession. The American distinction is not between oral and written but between absolute and mortgage transfers.

the law untouched.[1] It has recently been held in Illinois that this section abrogates the former Illinois rule of estoppel and makes the present Illinois law the same as the prevailing American rule at common law.[2] Statutes upon conditional sales existed in so many states, and they, as well as judicial decisions under the common law, were so divergent in important matters, that it was thought desirable to have a uniform statute thereon enacted. Consequently in 1918 the Commissioners for Uniform State Laws recommended for enactment a statute known as the Uniform Conditional Sales Act. This statute has now been adopted in about ten states, among them Pennsylvania.

Apart from the Uniform Conditional Sales Act, upon default of the buyer the prevailing American view, treating the transaction as an executory contract, allowed the seller an election. He could exercise his security title and retake the goods. If he did this, he was considered to have rescinded the contract and could not thereafter maintain an action for the price or for damages.[3] On the other hand, if he sued for the price or damages he could not thereafter retake the goods other than by attachment or execution as an ordinary creditor.[4] The necessity for electing between these remedies imposed a serious hardship upon the seller, for it deprived him of his right *in personam* buttressed by his right *in rem*. On the other hand, the election resting entirely with the seller, a serious hardship was often imposed upon the buyer, for if the buyer had paid a considerable portion of the price and made default, the seller would normally elect to retake the goods, and if he did so, the buyer, being in default, had no remedy. The seller would thus have both the chattel and the payments. This was felt to be so unjust that

[1] As to common law in the United States, see Williston on Sales, ss. 324, 327, 329; *Harkness* v. *Russell*, 118 U.S. 663; *Wentworth* v. *Woods Mach. Co.*, 163 Mass. 28; *Marvin Safe Co.* v. *Norton*, 48 N.J. Law 410; *Comer* v. *Cunningham*, 77 N.Y. 391.

As to the law of Louisiana, see *Barber Asphalt Paving Co.* v. *St. Louis Cypress Co.*, 121 La. 152; *Clyde Iron Works* v. *Frerichs*, 203 Fed. 637.

As to Illinois, see *Murch* v. *Wright*, 46 Ill. 487; *Drain* v. *La Grange State Bank*, 303 Ill. 330.

As to Pennsylvania, see *Stadtfeld* v. *Huntsman*, 92 Pa. St. 53; *Re G. & K. Trunk Co.*, 176 Fed. 1007.

As to effect of Uniform Sales Act, see *Peuser* v. *Marsh*, 167 N.Y. App. D. 604, 218 N.Y. 505; *O'Neill-Adams Co.* v. *Eklund*, 89 Conn. 232; *Dinsmore* v. *Maag-Wahmann Co.*, 122 Md. 177; *Collerd* v. *Tully*, 78 N.J. Eq. 557.

[2] *Sherer-Gillett Co.* v. *Long*, 318 Ill. 432.

[3] Williston on Sales, s. 579; *Schmidt* v. *Ackert*, 231 Mass. 330; *Russell* v. *Martin*, 232 Mass. 379; *Ratchford* v. *Cayuga, etc. Co.*, 217 N.Y. 565.

[4] Williston on Sales, s. 571; *Crompton* v. *Beach*, 62 Conn. 25; *Shepard* v. *Mills*, 173 Ill. 223; *Bailey* v. *Hewey*, 135 Mass. 172.

in a few states relief was accorded to the buyer in equity. If the seller retook the chattel, the buyer was allowed to recover the amount which he had paid less a fair sum for use.[1] This rule permitted a defaulting buyer to change a conditional sale into a lease. It seemed to the Commissioners on Uniform Laws that the desirable course was to treat the transaction in the main as a mortgage, thus protecting both buyer and seller. It seemed undesirable, however, to treat the transaction on the analogy of a mortgage in every respect. Conditional sales are so often concerned with chattels of little value, buyers after default so rarely redeem, and sellers if allowed to keep both the chattel and the payments so rarely derive an undue profit that a requirement of foreclosure by sale in every case would be unnecessarily cumbersome and expensive. There are no provisions concerning these matters in the Uniform Sales Act. The matter is treated at length by the Uniform Conditional Sales Act. Under that statute a seller may retake the chattel upon default and may resell and hold the buyer for a deficiency. (The buyer is entitled to any surplus.) Such deficiency can be recovered only after resale. Upon the seller's retaking the chattel the buyer is given a certain period of time to redeem. Failing to redeem, the buyer may demand a resale. Otherwise, resale is compulsory only in case the buyer has paid at least half of the total price.[2]

Statute of Frauds.—Under the words " contract for the sale of " in s. 17 of the Act of Charles II, 29 Charles II, c. 3, and under similar words in statutes replacing that statute,[3] an important distinction must be made between contracts to sell and contracts for work and labour. It may be supposed, for example, that A contracts with B to fit and furnish a set of artificial teeth. Is this a contract to sell the teeth, and therefore within the statute, or a contract for labour? The English law has gone through a complete cycle. The rule as finally stated is to the effect that if the contract is such that it will result in the passage of property to a chattel it is a contract to sell.[4] In earlier cases, the English Courts had followed another line of thought.[5] American cases had followed the earlier English

[1] *Hill* v. *Townsend*, 69 Ala. 286; *Pierce* v. *Staub*, 78 Conn. 459; *Latham* v. *Sumner*, 89 Ill. 233. See *Rayfield* v. *Van Meter*, 120 Cal. 416.

[2] Ss. 16–26. The provisions for record are contained in ss. 5–14.

[3] S. 4 of the Sale of Goods Act and Uniform Sales Act.

[4] *Lee* v. *Griffin*, 1 B. & S. 272. See *Isaacs* v. *Hardy*, 1 Cab. & E. 287.

[5] *Rondeau* v. *Wyatt*, 2 H. Bl. 63; *Garbutt* v. *Watson*, 5 B. & Ald. 613; *Clay* v. *Yates*, 1 H. & N. 73.

cases and have been indisposed to change as a result of the decision in *Lee* v. *Griffin*.[1] Prior to the adoption of the uniform law, New York had adopted a broad rule that any agreement to manufacture goods is not within the statute.[2] The usual rule, however, in the United States was the narrower Massachusetts rule, that if one contracts to make goods especially for another and not for the general market, the contract is not within the statute.[3] The English rule is the only logical one, but since the Massachusetts rule had been adopted so widely in the United States and did not seem objectionable on practical grounds it was enacted in the Sales Act.[4]

Under the term "goods, wares, and merchandises,"[5] it is sometimes important to distinguish between tangible chattels and interests in land. Nearly all the states had re-enacted in one form or another s. 4 of the Statute, but only about one-third of the states had re-enacted s. 17. The English law is to the effect that a contract to sell standing timber if an immediate severance is contemplated is a contract to sell goods.[6] The weight of authority in the United States is to the contrary.[7] The Sales Act in s. 76 has adopted the English rule.

A more important distinction is that between tangible personalty and choses in action. The English Courts have refused to bring any choses in action within the statute.[8] The weight of American authority, however, prior to the Sales Act, drew the line between ordinary choses in action and those represented by formal documents like bonds or shares in corporations, assimilating the latter to goods and bringing them within the statute.[9] As quite as strong an argument can be made for requiring a writing to render the sale of an intangible chose enforceable as for such a rule in the case of a

[1] The English rule is followed only in Missouri.

[2] *Parsons* v. *Loucks*, 48 N.Y. 17.

[3] Williston on Sales, s. 5; *Goddard* v. *Binney*, 115 Mass. 450.

[4] S. 4, subdiv. 2. See *Eagle Paper Box Co.* v. *Gatti-McQuade Co.*, 99 N.Y. Misc. 508.

[5] "Goods" in both the English and the American Acts.

[6] Williston on Sales, s. 62; *Marshall* v. *Green*, 1 C.P.D. 35.

[7] The authorities are collected in Williston on Sales, s. 62 n. 51 and n. 52.

[8] Williston on Sales, s. 67; *Humble* v. *Mitchell*, 11 A. & E. 205; *Bradley* v. *Holdsworth*, 3 M. & W. 422; *Knight* v. *Barber*, 16 M. & W. 66; *Heseltine* v. *Siggers*, 1 Ex. 856; *Tempest* v. *Kilner*, 3 C.B. 249; *Bowlby* v. *Bell*, 2 C.B. 284; *Duncuft* v. *Albrecht*, 12 Sim. 189; *Colonial Bank* v. *Whinney*, 30 Ch. D. 261, 283; *Evans* v. *Davies* [1893], 2 Ch. 216; Benjamin on Sales (6th Eng. ed.), 198.

[9] *Snow Storm Min. Co.* v. *Johnson*, 186 Fed. 745; *Banta* v. *Chicago*, 172 Ill. 204; *Tisdale* v. *Harris*, 20 Pick. (Mass.) 9; *Greenwood* v. *Law*, 55 N.J. Law, 168; *Somerby* v. *Buntin*, 118 Mass. 279.

chattel, the Sales Act has expressly included all choses in action, though in so doing it changed the law.[1]

" Price of ten pounds sterling or upwards." The price provision of the original statute has been re-enacted in the Sale of Goods Act, and in American statutes prior to the Uniform Sales Act fifty dollars had generally been the amount fixed. In order to approximate, however, the intent of the original statute, which the change in the value of the pound must to a large extent have frustrated, and also in order to effect a compromise, since a number of states had never enacted as part of their Statutes of Frauds a section relating to sale of goods, the Sales Act adopted five hundred dollars as the price limit. A few of the states in adopting the Sales Act have amended this provision. For example, in Ohio it is twenty-five hundred dollars ; in Connecticut one hundred ; and in New York fifty dollars.[2]

Subdivision 3 of s. 4 of the American Sales Act provides " there is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods." This accords with the earlier English law,[3] but in view of more recent cases [4] not followed in the United States, s. 4 (3) of the Sale of Goods Act provides " there is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale whether there be an acceptance in performance of the contract or not."

The original Statute of Frauds and the re-enactments in both the Sale of Goods Act and the Sales Act provide that the statute may be satisfied by a note or memorandum in writing signed by the party to be charged or his agent in that behalf. The English cases have developed the doctrine that a person's name in the body of the memorandum, though written or printed and delivered without any intention to have it authenticate the writing, is a sufficient signature.[5] American statutes prior to the Sales Act have generally required subscription and not merely signature.[6] It is probable that

[1] S. 4, subdiv. 1 ; *Stindt* v. *Stetson*, 272 Fed. 770.

[2] Williston on Sales, ss. 69, 70.

[3] Williston on Sales, ss. 74-80 ; *Parker* v. *Wallis*, 5 E. & B. 21, 26 ; *Rohde* v. *Thwaites*, 6 B. & C. 388, 393.

[4] *Kibble* v. *Gough*, 38 L. T. 204 ; *Page* v. *Morgan*, 15 Q.B.D. 228.

[5] *Lemayne* v. *Stanley*, 3 Lev. 1 ; *Knight* v. *Crockford*, 1 Esp. 190 ; *Griffiths Cycle Co.* v. *Humber*, [1899] 2 Q.B. 414, 418 ; *Jones* v. *Victoria Dock Co.*, 2 Q.B.D. 314.

[6] Williston on Sales, s. 112.

such interpretation will not be given to the Sales Act.[1] An intention to authenticate the writing was, however, generally necessary.

Future Goods. Doctrine of Grantham *v.* **Hawley.**—Transfer of title to future goods could be made at common law in the case of future crops of land and future young of animals under the doctrine of potential possession.[2] In the United States transfers of future crops by way of mortgage are still common and deemed effectual, though it is probable that a *bona fide* purchaser of the land or of the crops would be protected. In connexion with such transfers certain limitations grew up. The transfer must not be in reference to crops to come into existence at too remote a future time.[3] In some states the seeds must have been planted at the time of the transfer,[4] and in other states they must even have germinated.[5] In many states special statutory provisions exist. S. 5 of the Sale of Goods Act abolishes the doctrine of potential possession in respect to transfers by way of sale,[6] and this provision is copied in the American statute, but both Acts expressly provide that the statute is not applicable to transfers by way of mortgage.[7] The doctrine of potential possession seems still applicable to sales in such of the United States as have not enacted the Uniform Act; but the Courts are indisposed to extend it.[8]

Future Goods. The Doctrine of Holroyd *v.* **Marshall.**—The doctrine that an agreement to transfer future goods of a sort not within the doctrine of potential possession may give an equitable title,[9] has been adpoted in some states; in other states it has been adopted with limitations; and in others it has been abrogated.[10] Wherever adopted it has generally been placed on the ground of a specific performance of a contract to give security where the loan has already been made to the debtor.[11] The doctrine therefore is not affected by the Sales Act.

Subject-matter of Contract.—Both statutes drew a sharp

[1] See *Goldowitz* v. *Kupfer*, 80 N.Y. Misc. 487. The Sales Act uses the term "signed."

[2] Williston on Sales, s. 133; *Grantham* v. *Hawley*, Hob. 132; Y.B. 21 H. VI. 43; Benjamin on Sales (6th Eng. ed.), 154.

[3] Williston on Sales, s. 135; *Shaw* v. *Gilmore*, 81 Me. 396.

[4] *Rochester Distilling Co.* v. *Rasey*, 142 N.Y. 570.

[5] *Comstock* v. *Scales*, 7 Wis. 159.

[6] Williston on Sales, s. 134.

[7] Sale of Goods Act, s. 61 (4); Sales Act, s. 75.

[8] *Market St. Ry.* v. *Pacific Gas Co.*, 6 Fed. Rep. (2nd) 633.

[9] Williston on Sales, s. 138; *Holroyd* v. *Marshall*, 10 H.L.Cas. 191; *Mitchell* v. *Winslow*, 2 Story (U.S.) 630.

[10] Williston on Sales, s. 140. The authorities are collected in 19 Harv. L. Rev. 575.

[11] Williston on Sales, ss. 139, 141, 142, 143.

distinction between existing and future goods. An intermediate case, however, may arise of an agreement in reference to a portion of a larger existing mass. An agreement for the transfer of ten tons of oil out of a cistern containing forty tons cannot, of course, operate to transfer immediately property in any specific ten tons. There seems no reason, however, why the parties, though they say "ten tons," may not contemplate the immediate transfer of a one-fourth undivided interest in the mass and why, if they do so contemplate, this intent should not be legally effective. The earlier English cases [1] may be supported on this ground. Subsequent English cases,[2] however, have overruled these cases, and it seems that in England the inference of an intent to create a tenancy in common is not possible if the bargain in terms states the number, amount or measure of the goods in the mass which are to be sold.[3] The present English law, allowing recovery after such an attempted transfer, proceeds upon estoppel.[4] While an estoppel may in particular cases be present, the elements of true estoppel seem to be absent in most of the cases which have proceeded on that ground. There has been no representation of what the English Court holds as essential existing fact, severance from the mass.[5] The American common law recognized the possibility of a tenancy in common of an undivided share of a mass, especially in the case of fungible goods, though the parties in terms bargain for an amount determined by number, weight or measure.[6] While a tenancy in common is perhaps not to be presumed ordinarily, in many cases such as where the parties are clearly contemplating a present transfer, as is very often the case of grain in elevators and of other fungible goods, such presumption seems justified. The Sales Act in s. 6 expressly provides that there may be a contract to sell or a sale of an undivided share of goods, though the seller purports to sell and the buyer to buy a definite number, weight or measure of the goods.

The Price.—The Sale of Goods Act, s. 1 (1) defines a contract of sale of goods as "a contract whereby the seller transfers or agrees

[1] *Whitehouse* v. *Frost*, 12 East, 614.

[2] *Wallace* v. *Breeds*, 13 East, 522; *Austen* v. *Craven*, 4 Taunt. 644; *White* v. *Wilks*, 5 Taunt. 176; *Shepley* v. *Davis*, 5 Taunt. 617; *Boswell* v. *Kilborn*, 15 Moore P.C. 309; *Snell* v. *Heighton*, 1 Cab. & Ell. 95; *Busk* v. *Davis*, 2 M. & S. 397.

[3] Williston on Sales, ss. 146–59. See *Inglis* v. *Stock*, 10 App. Cas. 263; *Sterns Ltd.* v. *Vickers, Ltd.*, [1923], 1 K.B. 78.

[4] *Knights* v. *Wiffen*, L.R. 5 Q.B. 660; *Coventry* v. *Great Eastern Ry. Co.*, 11 Q.B.D. 776; *Ant. Jurgens Margarine* v. *Dreyfus* [1914] 3 K.B. 40.

[5] See for example *Gillett* v. *Hill*, 2 C. & M. 530.

[6] *Kimberley* v. *Patchin*, 19 N.Y. 330.

to transfer the property in goods to the buyer for a money consideration, called the price." This provision, following the English common law, would exclude exchanges or barters from the definition of a sale. Barters and exchanges, however, have been held to be within the provisions of the Statute of Frauds,[1] and in general the substantive law governing them is the same as that governing a strict sale.[2] Distinctions have been made chiefly for procedural purposes. It has been held, for example, that an action for goods sold and delivered cannot be brought upon a barter or an exchange.[3] The American Sales Act, following the American common law, defines a sale, s. 1 (2), as " an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price," and defines a contract to sell as " a contract whereby the seller agrees to transfer the property," etc. ; and in s. 9 (2) provides " the price may be made payable in any personal property." S. 9 (3) expressly excludes any interest in real estate.

Warranty.—In origin a warranty connected with the sale of a chattel is closely allied to tort. It was conceived of as a representation of fact which induced the bargain. Indeed, as late as the time of Blackstone it was considered that a warranty could not be promissory.[4] Since Blackstone's time there has been a tendency to draw the whole law of warranties into the law of contract,[5] and in England a warranty is now regarded as wholly promissory.[6] The Sale of Goods Act does not define warranty except by its legal effect.[7] The Sales Act, however, recognizes that a warranty may be either a representation of fact or a promise, following in this respect the prevailing American common-law view.[8] S. 12 provides " any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon."

At common law in England after the doctrine of implied warranty of quality developed and under the Sale of Goods Act no distinction seems made between the kind of goods subject thereto, or between

[1] Williston on Sales, s. 56 ; *Eaymond* v. *Colton*, 104 Fed. 219 ; *Dowling* v. *McKenney*, 124 Mass. 478 ; *Misner* v. *Strong*, 181 N.Y. 163.

[2] Cf. *Gallus* v. *Elmer*, 193 Mass. 106 ; *Howard* v. *Harris*, 8 Allen (Mass.) 297 ; *Veach* v. *State*, 71 Tex. Cr. Rep. 181.

[3] *Harrison* v. *Luke*, 14 M. & W. 139.

[4] 3 Bl. Comm. 165 ; Ames's *History of Assumpsit*, 2 Harv. L. Rev. 1 ; Williston on Sales, ss. 195, 196.

[5] *Stuart* v. *Wilkins*, 1 Dougl. 18. Ss. 10–15, 62.

[6] *Heilbut* v. *Buckleton* [1913] A.C. 30.

[8] Williston on Sales, s. 194.

the character of persons dealing therein.[1] The law regarding all sales seems to have advanced to the point earlier reached only with regard to sales of food for immediate consumption. In the United States, at common law, however, many distinctions exist. Growers, manufacturers or dealers are all subject to implied warranty of quality in respect to food-stuffs.[2] In the case of other goods, however, the tendency is to restrict the application of implied warranty to growers and manufacturers.[3] Such distinctions seem undesirable. As matter of policy dealers should be liable in this respect. The Sales Act here departs from the prevailing American common-law view, and, following the English statute, provides that sellers are subject to implied warranty of quality whether they be growers or manufacturers or not.[4]

Transfer of Property as between Seller and Buyer.—Ss. 16, 17, 18, 19 and 20 of the English Sale of Goods Act correspond to ss. 17, 18, 19, 20 and 22 of the American Sales Act. The provisions are almost identical. There are, however, some important differences.

The case of *Hanson* v. *Meyer* [5] had decided that where anything remained to be done to goods by way of measuring, weighing, etc., for the purpose of ascertaining the price, property in the goods did not pass until such act was done. This decision was based somewhat on the Roman Law, which required a definite fixing of price for a sale. Lord Ellenborough seemed to regard it as an absolute rule of law that under such circumstances property could not pass. There is no reason, however, why property in specific goods should not immediately pass, even though they are to be weighed or measured for the purpose of ascertaining the total price by the application of an agreed unit price to the total number of units. Such a case is to be distinguished from the case where parties contemplate the transfer of a portion of a mass and the weighing or measuring is to be done for the purpose of severance. English decisions [6] subsequent to *Hanson* v. *Meyer* have limited it in important respects : the rule is reduced to one of presumption and is applicable only when the seller is to do the weighing or measuring. As thus modified it is enacted in the Sale of Goods

[1] *Jones* v. *Just*, L.R. 3 Q.B. 197 ; *Preist* v. *Last* [1903] 2 K.B. 149 ; *Bristol Tramways & Co., Ltd.* v. *Fiat Motors, Ltd.* [1910] 2 K.B. 831.

[2] Williston on Sales, ss. 241, 242.

[3] *Ibid.*, ss. 230–6.

[4] S. 15.

[5] 6 East, 614.

[6] *Simmons* v. *Swift*, 5 B. & C. 857 ; *Turley* v. *Bates*, 2 H. & C. 200 ; *Kershaw* v. *Ogden*, 3 H. & C. 717.

Act, s. 18, rule 3. *Hanson* v. *Meyer* as a rule of presumption probably represented the prevailing rule in the United States at common law,[1] except in New York [2] and a few other states.[3] It was, however, in many states confused with another presumption to the effect that where in a contract for the sale of goods not in a deliverable state the goods are to be put into a deliverable state by the seller presumptively, property therein does not pass until the goods are thus put into a deliverable state. The rule of *Hanson* v. *Meyer* was felt to be illogical and practically undesirable, and therefore was not included in the Sales Act.

The Sale of Goods Act, s. 18, rules 2 and 3, in dealing with a contract for the sale of specific goods where the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, and also in dealing with the sale of specific goods in a deliverable state, where the seller is bound to weigh, measure, test or do some other act with reference to the goods for the purpose of ascertaining the price, provides that property does not pass until such act be done and the buyer has notice thereof. The requirement of notice was not part of the common law either in England or in the United States.[4] It is not to be found in the American Act.

Sale of Goods Act, s. 18, rule 4, deals with the delivery of goods to the buyer on approval or on sale or return. This section does not differentiate sharply between the case where the property passes to the buyer upon delivery with the privilege of returning the goods and revesting the property in the seller and the case where possession only passes to the buyer upon delivery and the property is to pass at some later time when the buyer does some act signifying approval. Such a distinction is important in respect to risk of loss. S. 19, rule 3,[5] of the Sales Act sharply distinguishes the two situations.

The Sale of Goods Act, s. 18, rule 5, subdivision 1, in regard to subsequent appropriation of goods to a bargain, corresponds almost exactly with the Sales Act, s. 19, rule 4, subdivision 1. There is, however, an important common-law difference between the law of the two countries which would still exist under these provisions. If goods are to be delivered by the seller to the buyer or are to be

[1] Williston on Sales, s. 269; *Elgee Cotton Cases*, 22 Wall. (U.S.) 180; *Sherman* v. *Mudge*, 127 Mass. 547; *Lingham* v. *Eggleston*, 27 Mich. 324.

[2] *Sanger* v. *Waterbury*, 116 N.Y. 371.

[3] Williston on Sales, s. 269. [4] *Ibid.*, ss. 265, 266.

[5] Rule 3 (1) deals with deliveries "on sale or return"; Rule 3 (2) deals with deliveries "on approval."

delivered to a carrier under the control of the buyer, the case is not strictly one of appropriation by the seller with authority of the buyer, as is the case where the seller is to ship to the buyer by an independent carrier.[1] The case of *Aldridge* v. *Johnson*[2] decided that where the buyer sent his own sacks for grain contracted for there was an appropriation *pro tanto* as fast as each receptacle was filled by the seller, although the contract was entire and the goods as a whole were not in deliverable condition, and the sacks while being filled were in the seller's possession. This result was apparently put upon the ground that as fast as the goods were put into the buyer's receptacle there was a delivery to the buyer. The presumption of such piece-meal appropriation would seem to be justified only when it can be said fairly that the buyer assents to becoming owner in such fashion and the seller also assents to the passage of ownership. As a general thing such assent exists only where the buyer or such an agent as has authority to accept a transfer of ownership to his principal takes the goods into his control, or where, though the receptacles are in the possession of the seller, they are of peculiar nature or value and the placing of the goods therein destroys the further use or value of the receptacle. *Aldridge* v. *Johnson* would not generally be followed in the United States,[3] although the case of *Langton* v. *Higgins*, if the receptacles had these characteristics, probably would be.[4]

S. 19, rule 4, subdivision 2, of the American Act dealing with delivery of goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer provides that the presumption is applicable in " collect on delivery " shipments, where the carrier is made the seller's agent to collect and transmit the price, which are common in the United States.[5] Such provision is not to be found in the Sale of Goods Act.

The American Act, s. 19, contains a fifth rule of presumption which is not to be found in the Sale of Goods Act : " If the contract to sell requires the seller to deliver the goods to the buyer or to a particular place, or to pay the freight or cost of transportation to the buyer or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place

[1] *Anderson* v. *Morice*, L.R. 10 C.P. 58, 609, 1 A.C. 713 ; *Colonial Insurance Co.* v. *Adelaide Insurance Co.*, 12 A.C. 128 ; Williston on Sales, s. 277.

[2] 7 E. & B. 885. [3] Williston on Sales, s. 277.

[4] 4 H. & N. 402 ; Williston on Sales, s. 277.

[5] Cf. *Lane* v. *Chadwick*, 146 Mass. 68 ; *Commonwealth* v. *Fleming*, 130 Pa. St. 138 ; 4 Col. Law Rev. 541.

agreed upon." This rule simply emphasizes certain things which would probably be reached under the other rules of presumption.[1]

The Sale of Goods Act, s. 19, in subdivisions 1 and 2, provides for the retention by the seller of a right of disposal of the goods until certain conditions are fulfilled. S. 2 provides that where goods are shipped and are by the bill of lading deliverable to the order of the seller, the seller is *prima facie* deemed to reserve the right of disposal. In the United States the receipts used in both land and water carriage are essentially similar, are called bills of lading and are treated as of similar effect. Sharp distinctions are drawn both in business usage and in law between bills of lading designating the goods as deliverable to order and those designating the goods as deliverable to a named person, or, as they are generally known, "straight bills."[2] The former document as between the parties is used widely as a security device, and in general is treated largely as a negotiable instrument. S. 20 of the Sales Act is more specific in its provisions than is s. 19 of the Sale of Goods Act. Subdivision 1 of s. 20 provides that the right of possession or property may be reserved by the seller. Subdivision 2 provides that where the goods are shipped and by the bill of lading are deliverable to the seller or to the order of the seller, the seller thereby reserves the property in the goods. The section then proceeds to define the nature of this property. If, except for the form of the bill of lading, the property would have passed to the buyer upon shipment, the seller's property thus reserved shall be deemed to be a security interest only. If in other respects compliance with the buyer's authority would have amounted to an appropriation upon shipment sufficient to make the buyer owner of the goods, the buyer becomes the beneficial owner subject to the seller's security interest. Subdivision 3 provides that where goods are shipped under a bill of lading deliverable to the order of the buyer but the seller retains possession of the bill, the seller thereby retains a right to the possession of the goods as against the buyer. Subdivision 4 of s. 20 differs in some material respects from subdivision 3 of s. 19 of the Sale of Goods Act. That subdivision of the English Act merely provides that where the seller draws upon the buyer for the price and transmits the bill of exchange and bill of lading to the buyer to secure acceptance or payment, the buyer does not secure the property in the goods until he honours the bill of exchange.

[1] Williston on Sales, s. 280.

[2] Williston on Sales, ss. 281–93; *Forbes* v. *Boston etc. R.R. Co.*, 133 Mass. 154.

Subdivision 4 of s. 20 of the American Act proceeds further and enacts that if the goods are deliverable to the buyer or to the order of the buyer, or if the document is endorsed in blank or to the buyer by the consignee named therein, one who purchases from the buyer in good faith and for value either the bill of lading or the goods will obtain the property in the goods even though the bill of exchange has not been honoured, provided such purchaser receives either the goods or the bill properly endorsed without notice of facts which would make the transfer wrongful. This provision gives the same effect to the transaction as to an agreement between the parties for security, where property and possession are voluntarily delivered to the buyer, that is the seller retains a security interest which is equitable in its nature and therefore subject to being defeated by a transfer to a purchaser in good faith and for value. Such probably would not have been the English common-law view, and it is doubtful whether it would have been the prevailing view at common law in the United States.[1]

S. 20 of the Sale of Goods Act dealing with risk of loss is similar to s. 22 of the Sales Act, except that the latter contains a provision that where delivery of the goods has been made to the buyer and the property in the goods has been retained by the seller merely for security, the goods are at the buyer's risk from the time of such delivery. This provision is of importance in throwing the risk of loss on a buyer who has possession under a conditional sale,[2] or to whom goods have been shipped in accordance with his order or contract, though for security the bill of lading retained by the seller provides that the goods are deliverable at their destination to him.[3]

Transfer of Title.—Ss. 22 and 24 of the Sale of Goods Act relating to the effect of sales in market overt have no counterpart in the Sales Act. The doctrine of market overt does not exist in the United States.[4]

The Sale of Goods Act, s. 25, and the Sales Act, ss. 25 and 26, deal with the very confusing and difficult subject of retention of possession by the seller. The confusion of the law on this subject is due to the existence of two doctrines having different origins and different objects although dealing with much the same subject-matter. Under the old common law, delivery was necessary to

[1] Williston on Sales, s. 292.

[2] *Ibid.*, ss. 303–5.

[3] *Browne* v. *Hare*, 3 H. & N. 484, 4 H. & N. 822; *Shepherd* v. *Harrison*, L.R. 4 Q.B. 196; *Mirabita* v. *Imperial Ottoman Bank*, 3 Ex. D. 164; *Inglis* v. *Stock*, 10 App. Cas. 263; *Farmers Bank* v. *Logan*, 74 N.Y. 568.

[4] *Ventress* v. *Smith*, 10 Pet. (U.S.) 161; *Dame* v. *Baldwin*, 8 Mass. 518; *Wheelwright* v. *Depeyster*, 1 Johns. (N.Y.) 471.

pass ownership to a chattel between buyer and seller.[1] By the sixteenth century it had become settled that title to chattels might be transferred by bargain or sale without delivery. The requirement for delivery did not, however, wholly disappear. Thus, if A sold a chattel to B and there was no delivery although the property would pass to B by virtue of the bargain, if A should subsequently sell and deliver the chattel to C, C would defeat B's interest. Lack of delivery to B vested a power in A to transfer a good title to a third person.[2] This is a survival of the old common-law necessity for delivery. The other doctrine is based on Statutes of Elizabeth [3] which provide that certain transfers with intent to hinder, delay or defraud creditors may be treated by the creditors as void. A typical case that these fraudulent conveyance statutes were designed to prevent was where a debtor to defeat an attachment by his creditor purported to transfer ownership to a buyer, but remained in possession. In *Twynes's* case [4] it was held that retention of possession by the seller was conclusive on the question of fraud. Subsequent English cases decided that such retention raised a presumption of fraud,[5] and finally that it was mere evidence [6] to be considered with all the other evidence of fraud. Gradually in England the common-law doctrine that delivery is requisite to transfer ownership was completely lost sight of,[7] but it re-emerges so far as concerns innocent purchasers in s. 8 of the Factors Act of 1889,[8] subsequently re-enacted in s. 25 of the Sale of Goods Act, which treats the problem as one of continuing or being in possession. There is no provision protecting creditors in general other than the provision of the Statutes of Elizabeth, although there are provisions in the Bankruptcy Act which would allow assignees in bankruptcy to take the property of which their bankrupts were in possession as reputed owner,[9] and provisions in the Bills of Sale Acts applicable to written transfers.[10]

In the United States the common-law requirement of delivery

[1] Williston on Sales, s. 350.
[2] *Ibid.*, ss. 349, 350.
[3] 13 Eliz. c. 5; 27 Eliz. c. 4.
[4] 2 Coke (Part III), 80*b*.
[5] *Bucknall* v. *Roiston*, Prec. in Ch. 285; *Edwards* v. *Harben*, 2 T.R. 587.
[6] *Martindale* v. *Booth*, 3 B. & Ad. 498.
[7] *Knowles* v. *Horsfall*, 5 B. & Ald. 134; *Reeves* v. *Capper*, 5 Bing. N.C. 136; *Langton* v. *Higgins*, 4 Hurl. & N. 402; *Young* v. *Matthews*, L.R. 2 C.P. 127; *Meyerstein* v. *Barber*, L.R. 2 C.P. 38, 51.
[8] 52 & 53 Vict. c. 45, s. 8.
[9] 21 Jac. I, c. 19, s. 11, re-enacted in substance in subsequent bankruptcy Acts.
[10] 41 & 42 Vict. c. 31; 45 & 46 Vict. c. 43; 53 & 54 Vict. c. 53; 54 & 55 Vict. c. 35.

was never completely lost sight of, and also most of the states have statutes based on the Statutes of Elizabeth. It was inevitable that the two rules should coalesce, and in about one-third of the states statutes require an immediate and continuous change of possession of the chattel to validate a sale as against innocent third persons whether creditors or purchasers. The common-law rule having its origin in the technical requirement of seisin was easily satisfied in most jurisdictions by constructive or symbolic delivery. Unfortunately this method of satisfying the requirement of delivery was applied by many Courts to satisfy the fraudulent conveyance statutes, which were dealing not with technical delivery but with a deceptive situation, created by the seller's retention of possession. On the other hand, some jurisdictions applied the strict fraudulent-conveyance conception to the matter of delivery. Apart from this difficulty, further difficulties were present because of the divergent views upon the effect of retention of possession. In some states it was considered as absolutely conclusive; in others it gave rise to a presumption that the transaction was fraudulent; in others it was merely evidence.[1] The Sales Act, in ss. 25 and 26, differentiates between subsequent buyers and creditors of the seller, although not between non-delivery and retention. In the existing state of American law at the time the Sales Act was drafted it was felt that a definite provision could be made, like s. 25 of the Sale of Goods Act, protecting subsequent purchasers from a seller left in possession; but that the most that could be done in respect to creditors was to provide that wherever retention was fraudulent in fact or deemed fraudulent under any local rule of law, creditors might treat the sale as void.

Ss. 27–40 inclusive of the Sales Act deal with documents of title and have no counterparts in the English statute. The American common law had given effect to order warehouse receipts and order bills of lading as symbols of possession and as between the parties as symbols of title. In respect to third persons, however, the documents were never regarded in all incidents as symbols of title.[2] Many states passed statutes designed to enact the complete mercantile conception of these documents as negotiable instruments. Such a conception, however, did not appeal to the Courts, and such statutes were narrowly construed. In *Shaw* v. *The Railroad*,[3] which presented the question whether a thief of an order bill of lading

[1] Williston on Sales, ss. 354-404.
[2] Williston on Sales, s. 406.
[3] 101 U.S. 557.

endorsed in blank can transfer title to the goods by transfer of the document to a *bona fide* purchaser for value under statutes which provided that order bills of lading " shall be negotiable and may be transferred by endorsement and delivery " and " they shall be negotiable by written endorsement thereon and delivery in the same manner as bills of exchange and promissory notes," the Supreme Court of the United States held that in the nature of things bills of lading cannot be the same as bills of exchange and promissory notes and that such transfer was inoperative to defeat the true owner. While the Sales Act enacts in general the mercantile conception of order documents of title, the effect of *Shaw* v. *The Railroad* upon the law in the various states was such that the Commissioners on Uniform Laws did not feel justified at the time when the statute was first drawn in recommending an enactment providing in this respect for the full negotiability of the document. S. 38 provides that the validity of the negotiation of a document is not impaired by the fact that the negotiation is a breach of duty on the part of the person making the negotiation or by the fact that the owner of the document was induced by fraud, mistake or duress to entrust the possession or custody to such person, but an innocent purchaser from a thief is given no protection.

In addition to the Sales Act, however, there exist other uniform statutes dealing specifically with documents of title : the Uniform Bills of Lading Act, recommended by the Commissioners for Uniform State Laws in 1909, and now law in about half the states, which deals with intra-state bills of lading ; the Act of Congress of 1916, known as the Pomerene Act, which deals with inter-state bills of lading ; and the Uniform Warehouse Receipts Act, recommended by the Commissioners for Uniform State Laws in 1906, and now law in almost all the states. The Warehouse Receipts Act contains provisions similar to those of the Uniform Sales Act.[1] The Bills of Lading Act [2] and the Pomerene Act,[3] however, go much further in enacting the negotiability of order bills of lading. Under these statutes an order or bearer document may be negotiated by any person in possession of the same however such possession may have been acquired ; and it is expressly provided that the validity of the negotiation of such document is not impaired by the fact that its owner was deprived of its possession by loss, theft, fraud, accident, mistake, duress or conversion. In August 1922 the Commissioners for Uniform State Laws recommended for enactment

[1] Ss. 40, 47. [2] Ss. 31, 38. [3] 39 U.S. Stat. 538, ss. 30,

amendments to the Uniform Sales Act to make provision for negotiability harmonious with the Uniform Bills of Lading Act.

The Sales Act further gives effect to the negotiable conception of order documents by providing [1] that goods properly placed under an order document cannot while in possession of the bailee under the terms of such document be attached by garnishment or otherwise or be levied upon under an execution unless the document be first surrendered to the bailee or its negotiation enjoined; and that a creditor whose debtor is the owner of a negotiable document of title shall be entitled to such aid from Courts of appropriate jurisdiction in attaching such documents or in satisfying the claim by means thereof as is allowed in regard to property which cannot readily be attached or levied upon by ordinary legal process.

Another American peculiarity of great importance, especially in international trade, is the use and effect of the so-called trust receipt.[2] Goods will be shipped consigned to the order of the seller or to the order of the buyer or to the order of a bank, and drafts will be drawn by previous arrangements usually on a bank and sent forward by the seller with the bill of lading attached. It is quite common for a buyer to desire to finance the shipment by means of the bill of lading and yet to utilize it and the goods until he is put in funds by reselling them either in their present form or after further manufacture. This purpose is usually accomplished by the bank's surrendering the bill of lading properly endorsed to the buyer in return for the buyer's execution of a trust receipt. Very rarely does this transaction take the form of a transfer of the title to the buyer by way of trust. It is generally specifically stated that the bank is to retain the full legal title to the goods until certain things are done by the buyer and that the buyer is to have in the interval merely the possession. The buyer can then get the goods from the carrier and deal with them as the trust receipt may provide. Sometimes it is provided that the buyer may subject the goods to processes of manufacture; sometimes that he may sell them and hold the proceeds for the bank. The bank is ordinarily given the right to reclaim possession at any time, if it deems itself insecure. The transaction is in essence a mortgage of chattels with the mortgagor in possession. It is open to all the vices of such a situation. Since all American states have chattel mortgage recording statutes it would seem that such a transaction would be void as against

[1] S. 39.

[2] Williston on Sales, ss. 338*a*, 338*b*, 437. Cf. Sale of Goods Act, s. 25 (2).

bona fide purchasers from and attaching creditors of the buyer, unless the trust receipt were recorded. Courts here, however, have drawn fine distinctions and have been inclined to uphold such transactions and to protect the mortgagee bank. If a Court can fairly find that the bank's interest is derived directly from the buyer, it will hold the transaction a mortgage,[1] otherwise not.[2] Usually, the interest is not directly transferred to the bank by the buyer but by the seller. Even purchasers of the properly endorsed document from the buyer are not generally protected,[3] apart from the Uniform Laws to which reference has been made. Though there seems a clear case of entrusting the indicia of ownership so as to raise an estoppel against the bank where the transfer is made of the document and not of the goods themselves apart from the document, courts have gone to the extreme in protecting the bank's security. Under the Uniform Sales Act as well as under the Uniform Acts governing bills of lading and warehouse receipts there can be no doubt that a *bona fide* transferee of a document in such a case would be protected even in those states which held the contrary view prior to the enactment of the Sales Act.[4] There is a movement on foot for the enactment of a separate Uniform Trust Receipts Act.

Rights of Unpaid Seller against the Goods.—The case of *Lickbarrow* v. *Mason*[5] decided that the seller's right to stoppage *in transitu* upon insolvency of the buyer being equitable in its origin and nature is subject to being defeated by a transfer by the buyer to a *bona fide* purchaser of the document of title controlling the goods. Presumably a stoppage would be completely effective before the transfer of such document although ineffective if made after the transfer. Under the American Act the doctrine of stoppage is subordinated to the conception of the negotiability of order documents. A transfer of the document to a *bona fide* purchaser therefore defeats the seller's right to stop regardless of whether the transfer is made before or after notice is given to the carrier.[6] The Sales Act in other respects, as has been already pointed out especially in connexion with the attachment of goods under an order document, has followed the conception of negotiability. So in regard to this

[1] *People's National Bank* v. *Mulholland*, 228 Mass. 152.

[2] *Moors* v. *Wyman*, 146 Mass. 60; *Moors* v. *Bird*, 190 Mass. 400; *Farmers Bank* v. *Logan*, 74 N.Y. 568; *Moors* v. *Kidder*, 106 N.Y. 32.

[3] Williston on Sales, s. 437.

[4] *Commercial National Bank* v. *Canal-Louisiana Bank*, 239 U.S. 520; *Roland M. Baker Co.* v. *Brown*, 214 Mass. 196.

[5] 2 T.R. 63; 1 H. Bl. 357; 2 H. Bl. 211; 6 East, 20, n.; 5 T.R. 683.

[6] Williston on Sales, s. 542.

matter, s. 59 (2) provides that if a negotiable document of title representing the goods has been issued by the bailee he shall not be obliged to deliver or justified in delivering the goods to the seller unless such document is first surrendered for cancellation. There are no similar provisions in the Sale of Goods Act.

S. 47 of the Sale of Goods Act provides that a transfer by the buyer of a document of title representing the goods will defeat the seller's right to stop if it was made by way of sale, but if it was made by way of pledge the seller's right to stop can be exercised subject to the rights of the transferee. In other words, the seller may in some cases reach part at least of the proceeds, although he cannot reach the goods.[1] It seems somewhat strange to start with the idea that a transfer to a *bona fide* transferee for value will cut off the seller's right to stop the goods but will leave him a right to reach proceeds in the hands of a transferee by notice to the carrier to stop delivery. American law has never adopted the doctrine of stoppage in respect to the proceeds when stoppage in respect to the goods has been defeated. In the United States it would seem that the doctrine of stoppage *in transitu* is applicable only to the goods themselves and only during original transit between the seller and the buyer.[2]

At the English common law an unpaid seller with a lien could do one of two things: retain the goods as security, or after notice resell the goods on behalf of the buyer and recover from the buyer the difference between the contract price and the amount realized on the sale.[3] This is re-enacted in s. 48 of the Sale of Goods Act. The American common law recognized a third alternative. The seller might rescind the passage of title without rescinding the contract and might then resell the goods on his own behalf.[4] Rescission could be exercised by the resale itself or by any other overt act. Consequently it would be possible for the seller to keep any profits of resale and still hold the buyer liable in damages.[5] Notice of an intention to resell or of the place of resale was not essential to the validity of the resale but was relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the resale was made.[6] These matters are substantially re-enacted in ss. 60 and 61 of the Sales Act.

[1] *Ex parte Golding*, 13 Ch. D. 628; *Ex parte Falk*, 14 Ch. D. 446; *Kemp* v. *Falk*, 7 A.C. 573; Williston on Sales, ss. 536, 537.

[2] Williston on Sales, ss. 523-37. [3] *Ibid.*, s. 554. [4] *Ibid.*, s. 555.

[5] *Bridgford* v. *Crocker*, 60 N.Y. 627.

[6] *Wrigley* v. *Cornelius*, 162 Ill. 92.

Actions for Breach of the Contract. Remedies of the Seller.— Ordinarily, unless the contract otherwise provides, the seller's right to the price as such arises upon the passage of the property to the buyer. On the other hand, if the property has not passed and if its passage depends upon some further assent on the part of the buyer and the buyer refuses to give such assent, although wrongfully, the seller's only right is an action for damages for breach of the contract. In New York, however, there early developed a peculiar doctrine based upon the early English decisions under the Statute of Frauds, which held that contracts to manufacture chattels were not contracts for sale within the statute, even though the contract provided that the manufactured chattel should be transferred to the buyer. These decisions were overruled by *Lee* v. *Griffin*. In *Bement* v. *Smith* [1] A had contracted to make a carriage for B, the title to pass upon delivery to B. Subsequently B refused to accept the carriage. The seller thereupon stored the carriage for B and in an action for the price was allowed to recover. It will be noted that this case presented the facts of a special order and that the decision was based upon cases involving the Statute of Frauds. In later New York cases,[2] however, these points become immaterial and it became the settled New York rule that in any contract to sell the seller by manifesting his election had any one of three remedies: first, he might store or retain the property for the buyer and sue him for the entire purchase price; secondly, he might sell the property, acting as the agent for this purpose of the buyer, and recover the difference between the contract price and the price obtained on such resale; or, thirdly, he might keep the property as his own and recover the difference between the market price at the time and place of delivery and the contract price. The New York rule thus ignores the fundamental distinction between a contract wherein the property has not passed and one wherein the property has passed, or, in other words, in effect permits a specific performance of a contract to sell a chattel by mere will of the seller and without any decree of Court. On the other hand, there are some practical reasons in favour of the rule. Taken in connexion with the American doctrine which allows rescission, it is unimportant to decide whether the property has or has not passed, because the seller's elections are the same in either case. Nevertheless, such practical advantages do not seem to outweigh the

[1] 15 Wend. 493.

[2] *Dustan* v. *McAndrew*, 44 N.Y. 72; *Ackerman* v. *Rubens*, 167 N.Y. 405.

theoretical difficulties except in those cases where on principle specific performance should be allowed if an Equity Court would take jurisdiction, and consequently, although the New York rule was followed in many American states at common law,[1] the Sales Act has adopted in s. 63 (3) a narrower rule. Although the property in the goods has not passed, if they cannot readily be resold at a reasonable price the seller may offer to deliver the goods to the buyer, and if the buyer refuses to receive them may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's and may maintain an action for the price.

Remedies of the Buyer.—An important difference exists between the English and American law in respect to the remedies of the buyer for breach of warranty. In England a peculiar distinction has been developed between warranties and conditions. A warranty is now regarded as wholly promissory, and a condition is regarded as a promise in respect to the goods so material that the actual goods dealt in are not essentially the goods which the parties had in mind. In other words, a condition in this respect is a promise so material that it may prevent the property in the goods from passing.[2] Remedies for breach of warranty as distinguished from condition are limited to recoupment, counterclaim or action for damages.[3] In the United States a warranty is regarded as either a material representation of fact in respect to the goods or a promise, and both remedies sounding in tort and remedies sounding in contract are applicable. In addition to the remedies of recoupment, counterclaim and cross-action most American states at common law, following the analogy of equitable relief for fraud and innocent misrepresentations of fact, permitted rescission of the title.[4] Consequently in the United States any representation of fact or promise, if material enough to amount to a warranty, is material enough to justify rescission in those cases where the title has passed. S. 49 of the Sales Act provides that acceptance of the goods by the buyer shall not discharge the seller from liability in damages for breach of warranty, but if after acceptance the buyer fails to give notice to the seller of the breach within a reasonable time after the buyer knows or ought to know of such breach, the seller shall not

[1] Williston on Sales, ss. 562, 563, 564-73.

[2] Williston on Sales, ss. 178-82; *Wallis* v. *Pratt*, [1910] 2 K.B. 1003; [1911] A.C. 394.

[3] *Street* v. *Blay*, 2 B. & Ad. 456.

[4] Williston on Sales, ss. 608, 608*a*.

be liable. S. 69 provides that the buyer at his election may accept or keep the goods and may recoup in diminution or extinction of the price; accept or keep the goods and maintain an action for damages; refuse to accept the goods if the property has not passed and maintain an action for damages; rescind the passage of title if the title has passed and recover any part of the price that has been paid. Subdivision 3 of s. 69 imposes an important qualification upon the right to rescind. Such right cannot be exercised if the buyer knew of the breach of warranty when he accepted delivery of the goods. In subdivision 2 it is provided that when the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted.

The American rule makes unnecessary many fine distinctions between conditions and warranties, and in many cases where there has been a breach of obligation, taken in connexion with other American doctrines, makes it unnecessary to decide whether the property has or has not passed in order to determine what remedies are available.

Uniform Interpretation.—"Generally when a part of the law is codified, the Courts in considering the effect of the Code have regard to the law of the jurisdiction as it existed before the passage of the Code. And if the Code appears to have been intended not as remedial legislation, but rather to state in exact form law previously existing, the implication is strong that the rule of the Code is similar to that previously in force. The primary purpose of the Sales Act is to introduce uniformity, and though in the main it purports to state law previously existing, it is not the law of any one state, but, where the law in the several states differs, what may be regarded as the better doctrine. Accordingly no inference is permissible that the law of any particular state is intended to be codified. The law of all the states must be considered, and the purpose to unify that law must be borne in mind. This has been clearly stated by several Courts."[1] The Uniform Sales Act has been well received by the Courts, and bids fair to achieve its purpose. It marked an advance in uniform legislation in the United States.

[1] This passage is quoted from Williston on Sales, s. 617, commenting on Sales Act, s. 74, and citing *Pope* v. *Ferguson*, 82 N.J. Law, 566, 572; *Commercial National Bank* v. *Canal-Louisiana Bank*, 239 U.S. 520, 528.

A FEW COMPARISONS BETWEEN ENGLISH AND SCOTS LAW.

II. THE LAW OF PERSONAL RELATIONS.

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Introductory.—The purpose of this article is to deal briefly with the Law of Personal Relations in England and Scotland, dividing the subject into five headings: A. Husband and Wife. B. Parent and Child. C. Infants: Pupils and Minors. D. Guardian and Ward. E. Master and Servant. Under these headings, the most important points in the law of each country is stated with a view to comparison.

A. Husband and Wife.[1]

Marriage.—Marriage in both countries is regarded not only as conferring status but also as being a form of civil contract, for which —like other contracts—consent is required. Failure to carry out the contract entitles the injured party to damages for breach of promise of marriage. Both countries agree as to the age at which marriage can be validly contracted—fourteen for males, twelve for females. The impediments to marriage are also the same; a suit of nullity (or a declarator of nullity in Scotland) lies on such grounds as non-age, forbidden relationship between the parties, insanity, intoxication, impotency, or want of consent.

Forms of Marriage.—With regard to the various forms in which marriage can be constituted there is considerable variance. In Scotland a marriage may either be regular or irregular or sometimes clandestine, but in England all marriages may be said to be regular. In England parties have the choice of a religious or a civil ceremony; they may be married either (1) in the church of their denomination before a clergyman after publication of banns, unless an episcopal licence or a certificate from the superintendent registrar is obtained

[1] Authorities. English law: Eversley on Domestic Relations, 4th ed. (1926), Part I. Scots law: Fraser on Husband and Wife, 2nd ed.; Walton on Husband and Wife, 2nd ed. (1922).

dispensing therewith, or (2) before the registrar in the presence of witnesses, after duly procuring his licence. In Scotland there is no such choice: the only form of regular marriage known is that which is celebrated by a minister of religion before witnesses, after the proclamation of banns, or after the publication of a notice by the registrar in lieu thereof. In an irregular marriage, on the other hand, there is neither religious ceremony nor publication: the sole foundation is the consent of the parties. Irregular marriages may take place in three ways:

(1) By declaration *de præsenti*, the parties agreeing informally to take each other as husband and wife. This—like all irregular marriages—is a civil ceremony, and if it takes place before a minister, or before a layman assuming the character of a minister, it is called in Scotland a clandestine marriage, for entering into which not only the parties, by certain old statutes, but also the celebrator are liable to penalties.

(2) By promise, *subsequente copula*.

(3) By cohabitation, habit and repute. In English law, it should be observed, the fact of cohabitation and repute is recognized as raising a presumption of marriage, but the presumption holds good only when the question of marriage is collateral to the main point at issue. It cannot—as in Scotland—form the basis upon which the marriage itself is proved.

An irregular marriage can be established by an action of declarator of marriage. There is, furthermore, a practice whereby parties, who have entered into an irregular marriage by declaration *de præsenti*, may have it proved by going before the sheriff of the county, who issues a certificate setting forth the fact of the marriage, and grants warrant to the registrar of the appropriate parish to register it.

Effect of Marriage on the Proprietary Rights and Liabilities of the Spouses.—The effect of marriage on the proprietary rights and liabilities of the spouses and on the wife's capacity to contract has been constantly changing in both countries, though not always contemporaneously, in response to the ever-growing independence of women in modern society. Thus in England the doctrine of the married woman's separate estate, having expanded by degrees, now includes all property belonging to her before or acquired by her after marriage. This—by the Married Women's Property Acts 1882 and 1893—she can sell, dispose of by will, or deal with in any way, just as if she was unmarried (unless any of her property

is placed in the hands of trustees with a restraint upon anticipation). In Scotland a series of Statutes, culminating in the Married Women's Property (Scotland) Act, 1920, give her similar freedom. With regard to contracts, the Statutes of 1893 and 1920 give the married woman, in England and Scotland respectively, complete capacity to enter into contracts and personal obligations, and to sue upon them, while she at the same time renders herself liable. There is this difference, however, that in England she is held to contract in respect of and to bind her separate estate, damages or costs awarded against her being "payable out of her separate property and not otherwise."[1] Her liability, therefore, is proprietary, not personal, and she cannot be committed to prison for non-payment of a debt under the Debtors Act. In Scotland, on the other hand, there is nothing analogous to the English doctrine of separate estate: the married woman's liability is personal, and—although there is no judicial ruling on the point—there seems to be no reason why she should not be amenable to the Debtors Act. On the same principle a married woman is, in Scotland, subject to the Bankruptcy Acts, whereas in England she is not, unless she is in trade or business. The measure of the husband's liability for his wife's post-nuptial debts is, broadly speaking, the same in both countries: the husband is not liable unless his wife acts as his agent; agency is presumed when, for example, she purchases necessaries for the household; but in other circumstances, for instance when she orders goods for her own use, the presumption is rebuttable on clear evidence of the husband's intention, express or implied, that she should not pledge his credit. In Scotland a husband cannot be made to answer for his wife's delicts, unless it can be shown that he was the instigator. In England, on the contrary, he is liable, although, since the Married Women's Property Act, 1882, a wife renders her separate estate liable also, and can therefore be sued in tort either jointly with her husband or alone.

Wills and Succession.—In both England and Scotland a married woman has full power to make a will. The law as regards succession, however, is widely different. In England there are no "legal rights"; no provision need be made for the surviving spouse or children, so that the husband can bequeath all his property to charities and leave his wife and children destitute. In Scotland, on the other hand, a surviving wife has her legal rights, which cannot be overthrown by her husband's will, entitling her to a share in his

[1] See the Married Women's Property Act, 1882.

estate. Thus the wife can demand her "jus relictæ"—one-third of her husband's personal estate, and her "terce"—one-third of the income of his heritage (real estate). A surviving husband has similar indefeasible rights over his wife's estate, namely, his "jus relicti"—the equivalent of the "jus relictæ," and his "courtesy" —the liferent, as in England, of all his wife's heritage, falling due only if there has been issue of the marriage. In practice a wife usually accepts provision in her husband's will in lieu of legal rights, or renounces them in favour of other measures in an ante-nuptial marriage contract.

Domicil necessary in an Action of Divorce.—Before proceeding to contrast the law as to divorce and separation, it is interesting to note the attitude taken by the Courts as to the degree of residence necessary to found jurisdiction in divorce proceedings. Until the last decade of the nineteenth century, the Courts of both countries gave weight to the doctrine that "matrimonial domicil," that is, residence falling short of domicil, was sufficient. This doctrine was, however, exploded in the case of *Le Mesurier* v. *Le Mesurier*,[1] which has been accepted as authoritative in Scotland also. At the present day, therefore, the general rule is that nothing less than the domicil of succession of the husband at the time the action is brought will suffice to found divorce jurisdiction.[2]

Divorce and Separation.—In England an action of divorce is brought in the appropriate Court of the Probate, Divorce and Admiralty Division, while in Scotland divorce cases are allotted indiscriminately to one or other of the Lords Ordinary in the Outer House of the Court of Session. The decree of divorce in England is first pronounced "nisi," and is not made absolute for at least six months, whereas in Scotland the decree is absolute *a primo*. The grounds for divorce are somewhat different in the two countries. Thus the adultery of either party has, in Scotland, always been a ground for divorce, but in England it is only since the Matrimonial Causes Act, 1923, that adultery alone on the husband's part is sufficient. Before that Statute it was necessary to prove incestuous adultery, adultery coupled with bigamy, with cruelty, or with desertion of not less than two years' duration. Adultery by the wife has, of course, both by English and Scots law always entitled the husband to a divorce. Again, desertion, if persisted in for four

[1] 1895 A.C. 517.

[2] The Indian and Colonial Divorce Jurisdiction Act, which has just passed, establishes an exception to this rule by enabling the High Court of India to grant divorces to parties who are domiciled not in India, but in England or Scotland.

years, is sufficient for divorce in Scotland, but in England is only ground for judicial separation, although desertion coupled with adultery—as already stated—gives rise to divorce proceedings in the latter country. Condonation or collusion is held in both countries to bar an action of divorce, but, while English law also regards recrimination as a bar to divorce proceedings, in Scotland " mutual guilt . . . entitles the parties to mutual divorces." [1] Voluntary deeds of separation may be entered into in both countries. A decree of judicial separation may be obtained both in England and in Scotland on the grounds of adultery or cruelty or—in England only—for desertion for at least two years, or for failing to comply with a decree for restitution of conjugal rights. To obtain a decree of judicial separation in Scotland, an action of separation and aliment is raised in either the Court of Session or the Sheriff Court ; in England procedure is by petition presented in the Divorce Court. In the latter country, moreover, speedy relief is afforded where the husband is guilty of neglect or cruelty, or has been convicted for an aggravated assault upon his wife by the Summary Jurisdiction Acts of 1895 and 1925 which provide that there may be pronounced by a " court of summary jurisdiction " (for this purpose the Court of Quarter Sessions or the Assize Court) an order tantamount, while it lasts, to a decree of judicial separation, making provisions as to custody and maintenance.

" Aliment," " Alimony " and " Maintenance." — The word " aliment " in Scotland covers the meaning of both the English terms " alimony " and " maintenance." Both in England and in Scotland a husband is legally bound to maintain his wife during the marriage ; and in both countries alimony can also be granted either during the continuance of divorce proceedings or when the parties are judicially separated. And in England, even after granting divorce, the Court has a wide discretion to order payment of a gross or yearly sum in respect of alimony, but in Scotland aliment cannot be awarded to a wife after divorce, although, if she is given the custody of the children, the Court may order the payment to her of a sum as aliment for their maintenance and education.

Effect of Divorce on the Proprietary Rights and Liabilities of the Spouses.—The effect of divorce on the proprietary rights of the spouses is very different in England and Scotland. In Scotland, on obtaining divorce, the innocent spouse becomes entitled to the same conventional or legal rights in the marriage settlement or

[1] Bell's *Principles of the Law of Scotland*, paragraph 1533.

personal estate of the guilty spouse as on the death of the latter, who of course forfeits all benefits accruing from the former. The Court can under no circumstances alter or vary the marriage contract. In England it is just the opposite: the Court has extensive power to alter or to vary marriage settlements and to make such orders for the application of the property as to ensure the greatest benefit to the children and innocent parent, but unless thus varied marriage settlements remain unaffected.

B. Parent and Child.[1]

Legitimacy.—The first point to arise in considering the relationship of parent and child is the question of legitimacy. The presumption of legitimacy, as expressed by the maxim "*pater est quem nuptiæ demonstrant*," is recognized in both England and Scotland, but does not extend to irregular marriages in the latter country. In Scotland the canon law of legitimation *per subsequens matrimonium* holds good—the offspring is legitimate if the parents marry at any time, whereas the law of England does not at present admit this means of legitimation, and furthermore refuses to recognize the status of legitimacy so conferred by a foreign country in so far as intestate succession to real estate in England is concerned. The Legitimacy Act, however, which came into operation on January 1, 1927, contains provisions for the adoption into English law of legitimation *per subsequens matrimonium*. Scotland, again differing from England, also recognizes as legitimate the issue of a putative marriage—a marriage invalid owing to an impediment, but entered into by both the parties or by one of them *bona fide*. In both countries the legitimacy of a person can be established by a declaratory action.

"Maintenance" and "Aliment."—The duty of the parent to maintain his child, in other words to provide food and necessaries for him, is constantly acknowledged by the English Courts, but only as an imperfect or unenforceable obligation. There is no legal duty on the father to maintain his children except by the operation of the Poor-Law, although he may be compelled to do so indirectly, if his neglect should bring the case within the province of the criminal law. Aliment, on the other hand, is directly enforced in the civil Courts of Scotland as an obligation arising *ex debito naturali*.

[1] Authorities. English law: Eversley's *Domestic Relations*, Part II. Simpson on the Law and Practice Relating to Infants, 4th ed. (1926). Scots law: Fraser on Parent and Child, 3rd ed.

Moreover, on the death of the person under an obligation to aliment, the liability transmits to his heir *ex jure representationis*. Refusal to aliment comes within the cognizance of the criminal law in Scotland also. In Scotland, should the father fail to provide aliment, the child may make him liable by contracting an alimentary debt, whereas in England the father is not liable for his child's contracts, unless it can be reasonably inferred that he authorized the child to incur such debts. With regard to illegitimate children, the father and mother are each liable, *ex jure naturali*, for aliment in Scotland, generally until the age of puberty, but sometimes for a longer period: usually an action is raised by the mother to sue the father for his share. In England there is no liability at common law, but there is a statutory obligation on the mother, while unmarried, and by the Bastardy Act, 1923, an order can be made against the putative father for weekly payments.

According to the law of Scotland, not only are parents bound to aliment their children, but children must also support their necessitous parents. The obligation to provide aliment is reciprocal. This is not the case in England unless the parent becomes a charge on the parish, in which event there is, under the Poor-Law, a statutory liability on the child to contribute to his support.

Rights of Parents as Guardians over the Persons and Property of their Children.—The rights of parents to the custody and control of their children are substantially the same in both countries, subject to the general distinction that in England infancy lasts until twenty-one, whereas in Scotland there are two periods of non-age, namely, pupillarity—which continues until the age of fourteen for boys, twelve for girls, and minority—which extends from fourteen or twelve to twenty-one. Broadly speaking, pupillarity is equivalent to infancy. The father is the natural guardian of his child until majority in England, and exercises in that capacity his rights of custody and control of the child's person, gives consent to his marriage and generally supervises his upbringing. In Scotland the father, as administrator-in-law of the child, is tutor during pupillarity and curator during minority. As tutor, his powers are similar to those of an English guardian. On reaching minority, however, the child acquires a considerable degree of independence, and the father, as curator, no longer has control over the child's person, and in other respects acts in but a secondary or advisory capacity, the minor being the "principal agent" in all his affairs. Thus a minor can marry, or go where he pleases,

without his father's consent. In each country the father has the custody of the infant and pupil respectively, and after his death the mother, and by the Guardianship of Infants Act, 1925, which applies to infants in England and pupils in Scotland, each parent is placed upon an equal footing as regards responsibilities and rights, so that when the Courts are called upon to decide a question of custody, the welfare of the child is their weightiest consideration. By the same Act either parent can appoint testamentary guardians to act jointly with the surviving parent. The custody of illegitimate children is given to the mother in both England and Scotland. With regard to the rights of parents over the property of their children, there is again similarity in the position of an infant and a pupil. The parent, as guardian of the former or tutor of the latter, acts in the capacity of a trustee and administers any of the child's property, real and personal, not regulated by trust. Not so the curator, who merely counsels and advises the minor and concurs with him in his deeds. Parental control, if abused, will be interfered with in England by the Court of Chancery or by the Divorce Court, and similarly by the Court of Session in Scotland.

Adoption.—The Adoption of Children Act—passed in October, 1926, and taking effect from January 1, 1927—introduces adoption into the law of England. An adoption order can be applied for, the effect of which is to transfer to the adopter all the rights and obligations of the parent as to the control, custody, education and maintenance of the child. Unless the adopter and the child are within the forbidden degrees of consanguinity, the adopter must be at least twenty-one years older. Adoption is not yet recognized in Scotland.

"Legal Rights" of Children.—In England a parent may ignore his child in his will, but in Scotland the child, as in the case of the surviving spouse, has an indefeasible legal right, known as "legitim," to either one-half or one-third of the father's personal estate, according as to whether the mother survives or not.

Rights of Children on the Intestacy of their Parents.—On the intestacy of their parents, the succession of the children of the marriage was, until 1926, much the same in both countries; the eldest son succeeded to the real estate, and the children were entitled to equal shares in the whole, or, if the intestate was survived by his wife, in two-thirds of the personal property. English law is now different, for the new law of intestacy, introduced by the Administration of Estates Act, 1925, abolishes the distinction between

inheritance of real and of personal property, and creates a residuary estate, to be held on statutory trust for the children subject to the right of the surviving spouse to the income of half the residue for life.

Powers of Bastards to Succeed or Make Wills.—Bastards are, by the law of both England and Scotland, incapable of inheriting lands or succeeding to the personal property of an intestate. In England they can, however, accept a legacy or bequest if designated or unequivocally referred to, or take under a gift-over, and in Scotland they can take under express destinations as heirs of provision. They can also make wills, but can have no heirs except their lawful issue, and if a bastard dies intestate without leaving a widow or lawful children, the Crown succeeds to his estate.

Torts: Parents' Right of Action on Child's Death through Injury.—For a tort (or delict) committed by a child, English and Scots law agree that as a general rule the father is not liable, unless the act was done with his sanction or at his bidding. In England a parent can maintain an action for a tort done to his child on the basis of a quasi-relationship of master and servant, provided that the child is of such an age as to be presumed by law to be of some service. There is no equivalent action in Scotland. When, however, the injury causes the child's death, in both countries the parent has a right of action: in England the right arises under the provisions of Lord Campbell's Act, 1846, which established an exception to the common law rule, whereas in Scotland the action lies at common law on the foundation of nearness of relationship and a mutual obligation to support in case of necessity. Conversely, a child has, in either country, a similar title to sue on the death of the father.

C. Infants: Pupils and Minors.[1]

Infancy, Pupillarity and Minority.—In England, it has already been observed, there is only one period of non-age—infancy, as against two in Scotland—pupillarity and minority; and pupillarity bears a general resemblance to infancy. English and Scots law agree as to the age of capacity to contract marriage, which is held to be fourteen for boys, twelve for girls, and this is the only purpose for which English law recognizes an intermediate age.

[1] Authorities. English law: Simpson on the Law and Practice relating to Infants. Eversley's *Domestic Relations*, Part IV. For contracts, see Anson on Contracts, 16th ed. (1923). Scots law: Fraser on Parent and Child. For contracts, see Gloag on Contract.

Prefaced by these general propositions, a more detailed comparison of the law on this subject may now be proceeded with.

Capacity to Contract of Infants, Pupils and Minors.—In England, an infant's capacity to contract now depends upon the Infant's Relief Act, 1874. Before that Act, his position at common law was as follows: his contracts were voidable at his option, except contracts for necessaries, and, in certain cases, contracts for his benefit, which were valid. His voidable contracts fell into two classes: (1) contracts of a continuous nature (such as an interest in property or a partnership), which bound him until he disaffirmed them either during infancy or reasonably soon after majority; and (2) all other contracts, which he had to ratify soon after majority in order to make binding. The effect of the Infant's Relief Act may be stated thus: it made all the infant's contracts, which were previously voidable at common law, absolutely void, but preserved as valid contracts for necessaries and contracts for his benefit; it still recognized what may be called the "continuous class" of contracts, holding them valid unless disaffirmed, as before, reasonably soon after majority; but it enacted that he could no longer ratify at majority those contracts which, at common law, were not binding until thus affirmed.

In Scotland a pupil has no power to contract, but he is liable at common law, and by the Sale of Goods Act, 1893, for necessaries sold and delivered: he is also liable for money lent to purchase necessaries, and he is liable by the doctrine of recompense, which is unknown in England. Recompense is of the nature of a quasi-contract, and has been defined thus: "Where one has gained by the lawful act of another, done without any intention of donation, he is bound to recompense or indemnify that other to the extent of the gain." [1]

The common law of Scotland gives a minor full contractual powers, except that he cannot gratuitously alter the succession to his heritage. But all his contracts, excluding contracts for necessaries or transactions *in rem versum* (*i.e.* for his benefit), or in trade which are valid, are voidable at his option with this result, that during a period known as the "*quadriennium utile*" he may set them aside, or—as Scots lawyers express it—obtain "*restitutio in integrum*," if—and only if—there has been "*enorm lesion*" (*anglice*, grossly inadequate consideration). The *quadriennium utile* covers the first four years after majority. A contract made during

[1] Bell's *Principles of the Law of Scotland*, paragraph 538.

minority can always, in Scotland, be ratified and adopted on the attainment of majority. If a minor has a curator, the curator's consent must be obtained, or the contract is null and void; but the presence of a curator does not increase the scope of the minor's capacity. And the fact that the curator has consented does not bar the minor from subsequently setting the contract aside, on the plea of "minority and lesion," during the *quadriennium utile*.

Summary of the Law as to Contracts.—The following is a very brief summarized comparison of the law of England and Scotland as to the contracts of those of non-age. In both countries contracts for necessaries or for the child's benefit are valid, but the Courts differ in their views as to what are necessaries. In Scotland all goods are regarded as necessaries which are suitable to the station in life of the child, although he may be already supplied with them. The English Courts, however, restrict their definition to apply only to goods suitable to the position of the infant, which have not in fact been already supplied to him. And even apart from contract, liability for necessaries delivered and used is enforced upon pupils, minors and infants alike by the Sale of Goods Act. With regard to other contracts, an infant's contracts are void, a pupil's contracts are also void, while a minor's contracts are voidable at his option during the four years after majority. In Scotland all contracts may be ratified at majority, but in England no such ratification is possible, and English law is emphatic upon this point, refusing to uphold any ostensibly new contract made after majority, if it is in effect a ratification of a previous one.

Power to make Wills and Marriage Settlements.—The power to make a will does not extend to those of non-age in England (except soldiers); but in Scotland, although a pupil cannot make a will, a minor has the same testamentary capacity as a person of full age, except that he cannot—unless by marriage contract—alter the succession to his heritage. A minor, it should be noted, has full capacity to enter into a marriage contract, while an infant can execute a settlement only with the approval of the Court and at the age of twenty (or seventeen in the case of a female infant).

Bankruptcy.—A minor is subject to the Bankruptcy Acts and can be adjudicated bankrupt, but an infant cannot. Consequently, if an infant is a partner in a firm, a receiving order against the firm is valid only if it expressly excludes him. A pupil is not liable to bankruptcy, but can be made bankrupt for debts incurred by his tutor on his behalf.

Torts.—The commission of a tort subjects an infant to liability, but an action cannot be raised merely on a breach of contract treated as a tort. A minor also is liable for his delicts, and a pupil may incur liability if—and this is a question of fact in each case—he is able to understand sufficiently the import of his acts.

Legal Proceedings.—When an infant is plaintiff in legal proceedings, he sues by his "next friend," who usually is his guardian, but may be any person of substance with no adverse interest. An infant, however, can himself raise an action for wages in the County Court when the sum claimed is under £100. When he is sued, service should be made on his guardian, and he defends through a guardian *ad litem* appointed by the Court for that purpose. A pupil sues in name of his tutor as legal guardian, and conversely an action is directed against him and his tutor. If he has no tutor, or if the latter has an adverse interest, a curator *ad litem* is appointed. A minor can raise an action alone, but must obtain the concurrence of his curator, if he has one; and he is sued together with his curator. If he has no curator, the Court will appoint a curator *ad litem*. A decree against a pupil or minor whose guardian has defended the action with him may still be set aside within the *quadriennium utile*.

D. Guardian and Ward.[1]

In contrasting briefly the relationship of guardian and ward in England and Scotland, an endeavour has been made to preserve a logical sequence at the expense of a certain amount of repetition of what has already been stated. The position of infants and pupils as regards guardianship is dealt with first; the guardianship of minors later.

Appointment of Guardians in England.—In England the father is the natural guardian of his child. On his death, the mother becomes guardian, by the Guardianship of Infants Act, 1886, acting either alone or jointly with the guardian appointed by the father in his will. Either the father or the mother can appoint guardians by will, and their nominees act jointly, the Guardianship of Infants Act, 1925, providing that the rights of spouses are to be equal in this respect. If the father and mother are dead and there are no testamentary guardians, or if there has been misconduct

[1] Authorities. English law: Eversley's *Domestic Relations*, Part III; Simpson on Infants. Kerr on Receivers, 8th ed. (1924). Scots law: Fraser on Parent and Child. Campbell Irons on Judicial Factors.

or mismanagement on the part of any guardian, the Court of Chancery appoints a guardian to the person or estate of the ward, or to both, the child becoming a ward of Court.

Appointment of Guardians to Pupils in Scotland: Tutors.—In Scotland the father, as administrator-in-law, is tutor to his pupil child, and Scots law resembles English law as regards the father and the mother and their right to appoint testamentary guardians, or tutors-nominate as they are called, for the Guardianship of Infants Acts apply to pupils in Scotland. Failing the father and the mother and tutors-nominate, the office used to be filled by a tutor-at-law—very often the nearest agnate, and failing him again, it became necessary for the Court of Session to appoint a tutor-dative. Tutors-at-law and tutors-dative are, however, seldom appointed in modern practice, a factor *loco tutoris*—whose functions will be explained later—being appointed by the Court of Session, or, in the case of small estates, by the Sheriff. A guardian *ad litem* (or a curator *ad litem* in Scotland) may be appointed when an infant, pupil or minor is a party to a lawsuit.

Termination of Guardianship of Infants and Pupils.—Guardianship lasts until the majority of the ward, but does not appear to be terminated by the ward's marriage. A tutor's office ends on the pupil attaining minority. During the continuance of the wardship, both the Court of Chancery and the Court of Session have full power to remove any Guardian for improper conduct.

Duties of Guardians as regards the Persons and Property of Infants and Pupils.—In both countries guardianship is regarded as a trust, and—excluding Chancery guardians whose position is different—the duties of guardians and tutors are, broadly speaking, similar. They are entitled to the custody and control of their wards' persons, and are responsible for their education and upbringing. In England the guardian must also protect his ward against contracting an unsuitable marriage, and must give his consent when he considers the match fitting. This duty does not devolve upon a tutor by reason of the pupil's age, nor in fact upon a curator, for in Scotland a minor may marry whom he (or she) pleases in defiance of the wishes of the curator. A guardian must see that the infant has an adequate maintenance, a tutor that the pupil has sufficient aliment, for which purpose an encroachment may be made upon capital, with the sanction, if necessary, of the Court. With regard to the ward's personal estate, guardians and tutors alike must act as trustees and concern themselves with realization and

investment and with administrative duties. They may break into capital of their own accord where so authorized, or otherwise by leave of the Court. A tutor is responsible for the upkeep of the pupil's heritage: furthermore he can grant leases, and he can sell the property or borrow on the security of the trust estate, obtaining leave, if need be, from the Court. The position of a legal guardian (*i.e.* the father or the mother) in England in relation to the ward's real property is much the same as that of a tutor, but the extent of the testamentary guardian's powers has not been precisely defined.

Wards of Court.—An infant becomes a ward of court either (1) when a suit is instituted in respect of his person or property; or (2) when a guardian is appointed by the Court of Chancery; or (3) when in certain cases there is a payment into Court of money in which the infant has an interest. When there is already a father or other guardian, unless there is evidence of improper conduct, the Court will not usually appoint another person, but whoever the guardian is, he is subject directly to the control of the Court, and is really nothing more or less than the Court's servant. Thus he can do nothing to affect the person or property of the infant without the direction of the Court, and any act done by him without direction —for example, the arranging of an unfitting marriage—or, indeed, any unwarranted interference with the ward by third parties, is held to be a contempt of Court. In Scotland there is nothing analogous to wardship of Court.

Guardianship of Minors in Scotland: Curators.—A curator has been defined as "a person appointed to assist a minor in the administration of his property with his advice and counsel."[1] Thus a curator differs from a tutor in that he has no control over the person of his ward, and acts in merely an advisory capacity. A minor cannot be compelled to have a curator, for he has very nearly the same degree of capacity as an adult, but owing to his tender years and necessarily immature judgment it is considered proper that he should have advice and guidance.

Appointment of Curators.—The father is *ipso facto* curator to his minor child; the mother is never curator. Testamentary curators can be appointed, under the provisions of an early Statute, by the father, but not by the mother. Failing testamentary curators, the minor is entitled to raise an "action of choosing curators" in the Sheriff Court or the Court of Session, but recent

[1] Fraser on Parent and Child, 3rd ed., p. 449.

practice has largely superseded this procedure, and in similar circumstances the Court usually appoints a curator *bonis*.

Duties of Curators.—The duties of a curator consist of acting as advisor in all matters pertaining to the minor, his personal property or his estate. For example, he must see that the minor receives the requisite amount of aliment, that the rents and outstanding debts are collected, that proper investments are made and that the heritable property is kept in good order. He must concur in the minor's deeds, for the deeds of a minor without the consent of his curator are with few exceptions void. Thus the minor with the concurrence of his curator can sell his heritage; the consent of the Court need not, in fact cannot, be obtained, for it is within the curator's discretion to sanction a sale of heritage. And herein lies a difference between English and Scots law that pervades the law of trusts generally, namely that in England a trustee or guardian can obtain a ruling of the Court on any point of difficulty, whereas in Scotland the authority of the Court cannot be invoked to lessen the responsibility of any guardian or trustee as long as he has discretion to act. It must be noted, however, that one of the proposals for reform at present under consideration by the Royal Commission in Edinburgh is that an action for direction of trustees should be introduced in Scotland.

Termination of Curatory.—Curatory terminates at majority or on marriage, or on the forisfamiliation of the minor. Forisfamiliation signifies, in Scots law, the breaking away from the *patria potestas*, for instance by starting a separate business.

Judicial Factors and Receivers.—It remains to compare the functions of the judicial factor and the receiver in so far, at any rate, as the property of children is concerned. A judicial factor is a person appointed by the Scottish Courts to administer the estate either of a pupil—when he is called a factor *loco tutoris*, or of a minor—when he is known as a curator *bonis*. Receivers were formerly appointed only by the Court of Chancery, as a means of attaching by equitable execution various equitable interests which were beyond the pale of the Courts of Common Law, but at the present day they are appointed in a variety of circumstances to administer or protect property. The jurisdiction to appoint receivers was extended, by the Judicature Act, 1873, to the High Court of Justice, and a receiver may now be appointed in all cases in which the Court considers it "just and convenient" to do so. When a receiver is appointed to protect the estate of an infant, he

corresponds in that capacity to the judicial factor in Scotland. Thus the receiver and the judicial factor are both officers of Court, and both are appointed in similar circumstances, namely, when the child's property is unprotected because there is no guardian or trustee, or because the conduct of the guardian or trustee is such as to endanger it. A distinction arises, however, when there is a testamentary guardian or tutor-nominate: in England the existence of a testamentary guardian does not prevent the appointment of a receiver, because the guardianship of the Crown as *parens patriæ* is supreme; but in Scotland a judicial factor will not be appointed when there is a tutor-nominate, unless the latter has an adverse interest, or, of course, is mismanaging the child's affairs.

Duties and Powers of Judicial Factors and Receivers.—The duties of the receiver and the judicial factor, when they act in this particular capacity, are, broadly speaking, the same. It is incumbent upon both to attend to the recovery of rents and debts, to the realization and investment of personal estate, and to the management of real estate. They can also, with the sanction of the Court, sell the real estate or make payments out of capital. The powers of the judicial factor, however, having been supplemented by legislation, are wider than those of the receiver. He is included in the Trusts Acts as a trustee; he is consequently possessed of wide discretionary powers and need apply to the Court only when he finds it necessary to go beyond them. The receiver, on the other hand, is under the close control of the Court, and cannot to any great extent exceed the powers specified in the order appointing him, without applying to the Court for directions.

E. Master and Servant.[1]

The Contract of Service.—A servant may be hired in England by a parol agreement, but if the duration of the service is to be for more than one year, then, by the Statute of Frauds, writing is necessary. The writing need not be formal, but the consideration must appear. Similarly in Scotland a contract for less than a year may be verbal, but if for more than a year, it must be in writing probative of both parties. The term "probative" as used in Scots law

[1] Authorities. English law: Smith on Master and Servant, 7th ed. (1922); Eversley's *Domestic Relations*, Part V. Scots law: Umpherston on Master and Servant (1904); Fraser on Master and Servant, 3rd ed. (1882).

is indicative of the formal character of the document.[1] No consideration, however, need appear in the contract of hiring, for it is one of the cardinal differences between the law of contract in England and in Scotland that Scots law does not recognize the doctrine of consideration. Specific performance of a contract of service will not be enforced by the Courts of either country.

Presumptions as to Duration of Service.—A contract of service is presumed, in England, to last for one year as a "general hiring," if no definite period is expressed or implied from the nature of the employment. No general rule, however, can be laid down, and the matter must be decided by the circumstances of each case. In Scotland, too, there arise certain presumptions as to the duration of service. For example, in the absence of express stipulation, a domestic servant is presumed to be hired for six months, an agricultural servant for one year, but here again the presumptions are not of great importance and each case stands by itself.

Notice.—When the contract is of no definite duration, it must be terminated by notice. In England domestic and menial servants may be dismissed on thirty days' notice or by payment of one month's wages in advance, while in Scotland all agricultural and domestic servants are entitled to forty days' notice. In both countries, in other forms of employment, service may be terminated either by the notice customary to the trade in question or, in the absence of any custom, by notice reasonable in the particular circumstances.

"Tacit Relocation" and "Implied Renewal."—When the contract of service is for a period not exceeding a year and notice has not been given within the proper time, it is renewed for a similar period by "tacit relocation" in Scotland, which is thus equivalent to "implied renewal" in England.

Effect of Death or Bankruptcy of Master.—In both countries the death or bankruptcy of the master dissolves the contract. In Scotland, however, domestic servants are entitled to remain in the service of the family after the master's death until they get other employment, or, at the most, until the end of the succeeding term, whereas in England, it seems, the servant can be dismissed at once.

Servants' Wages as Preferential Payments.—On the bankruptcy

[1] More particularly a writing is said to be probative (1) if it is signed before witnesses; (2) if it is in the party's own handwriting and signed by him (when it is said to be "holograph"); or (3) if it has the words "adopted as holograph" written by the party above his signature.

of the master the Bankruptcy Acts of both England and Scotland create a statutory preference in favour of servants' wages. In Scotland, moreover, if the master dies, the servant has also a preference, but in England it is very doubtful whether such a preference exists.

Limitation of Action as Regards Wages.—In Scotland a servant must sue for his wages within three years of the cause of action arising; in England a similar action is valid if brought within six years.

Attachment of Wages.—Wages may be arrested in Scotland in so far as they exceed 20*s.* per week, but in England the Wages Attachment Abolition Act of 1870 altogether forbids attachment.

The Liability of the Master for the Contracts of his Servant.—The liability of the master for the contracts of his servant is based upon the principles of agency in both countries, and is, generally speaking, similar.

For his Servant's Torts.—Alike too are the principles governing the liability of the master for the wrongful acts of his servant, for this subject forms part of the Law of Negligence—a branch of the law which is practically identical in England and Scotland.

For his Criminal Acts.—With regard to criminal acts committed by the servant, in neither country is the master liable unless he is the instigator or has personally co-operated, although in certain cases the Public Health Acts, the Factory Acts and various other enactments, on the grounds of public policy, invest the master with a statutory liability for acts done by his servant even if contrary to his orders. And even when the master is liable the servant is generally liable also.

Rights of Action arising from Seduction of or Injury to Servants.—In England a master has an action against one who seduces (*i.e.* debauches) or injures his servant "*quod servitium amisit*," but in the case of seduction the servant can raise no action on the principle that "*volenti non fit injuria.*" In Scotland, on the other hand, the position is reversed, since the servant, if seduced, can sue for damages, but there is no action available to the master on the grounds of loss of services. In neither England nor Scotland does an action lie at the instance of the master for injuries causing the death of the servant.

Interference with the Relationship of Master and Servant: Conspiracy.—The master and the servant both have a right, the one to receive, the other to give, fulfilment of their contractual

obligations without molestation or disturbance by third persons. Both in England and Scotland an action lies against one who entices away the servant of another. The law of each country, nevertheless, permits a considerable degree of interference if genuine competition in trade, not intent to injure, is the motive. But a conspiracy to injure a man in his trade is actionable, though English and Scots law differ as to what precisely is actionable conspiracy. Thus in Scotland it is held that there is no liability unless the acts complained of would have been unlawful if done by one person, but according to the English decisions, what is lawful when done by one may become unlawful when done by several acting in concert.

The Master's Liability to the Servant for Injury received in the Course of Employment.—Finally, the master's liability to the servant for injury received in the course of employment is the same, for not only is the doctrine of common employment recognized in both England and Scotland, but the Employers' Liability Act, 1880, and the Workmen's Compensation Acts also apply to both countries.

THE APPLICATION OF JEWISH LAW IN PALESTINE.[1]

[*Contributed by* NORMAN BENTWICH, ESQ., M.C.]

IN England, and in Western countries generally, Jewish law has a very restricted recognition in the law of the land. In England its sphere is confined to marriage relations ; and even there it is allowed only to determine conditions of the celebration, and is not regarded upon questions of capacity for marriage or divorce. In Russia of the old régime it was recognized for purposes of succession as well as of marriage ; but it is in the East that it has received, and still receives, a wider acknowledgment as a system of personal law which governs generally the questions of personal status of members of the Jewish community.

The doctrine of the personality of law, that is, that persons who are subjects of the same State enjoy a different system of law according to the particular religious or national community to which they belong, has survived in the Orient, though it disappeared from Europe after the Middle Ages. There is no territorial law in Moslem countries—or there was not, till the recent outburst of modernism in the Ottoman Republic—which prescribes the rules for all members of the State in such matters as marriage, guardianship and succession. Those topics have been left to determination by religious law : the Moslems apply the rules of the Sharia as prescribed by Mohammed and developed by jurists ; the Christians apply decrees and edicts of the Byzantine Emperors, giving a long lease of life to the Roman family law ; the Jews apply the rules of the books of Moses as developed by a tradition of 3,000 years. The recent case of *Sasson* v. *Sasson* which was decided by the Privy Council [2] illustrates the application of the Jewish law of divorce by a rabbinical Court to British subjects living in a Moslem country —Egypt—in virtue of the provisions of the Order in Council defining British jurisdiction in the former Ottoman Dominions.

[1] A lecture delivered before the Jewish Jurisprudence Society in London.

[2] [1924] A.C. p. 1007.

Nor did the Ottoman sovereign attempt to establish one single system of Courts to apply these different laws. The Turks acted, from the time of the conquest of Constantinople, upon the principle of *laissez-juger*. They allowed the non-Moslem peoples in their midst to continue to hold their own tribunals dealing with matters of law which were governed by the religious codes, just as they allowed the Europeans in their midst to have their own consular judges applying their national laws.

The religious authorities of each recognized community were invested with judicial powers over members of their community, and their judgments were executed by the officers of the State. Thus, wherever the Ottoman sway extended, there were, besides the Moslem religious Courts of the Kadis, the Courts of the different Christian Patriarchs or their representatives and rabbinical Courts. The Turks, who favoured an autocracy in the sovereign State, conferred the full judicial power upon the ecclesiastical head, the Sheikh El Islam for Moslems, the Patriarch for Christians, and the Haham Bashi or Chief Rabbi for Jews, and allowed the single head to delegate his powers to local subordinates.

Such was the position in Palestine with regard to the recognition of Jewish law and Jewish Courts at the time of the British Occupation. Curious anomalies existed, indeed, in the jurisdiction of the Jewish Courts which were due to the tendency in the Moslem State to give a certain preference and priority to the Moslem tribunals. Thus, while those Courts had jurisdiction in matters of testamentary succession, they could not legally deal with intestate succession; and application for certificates of inheritance had to be made to the Moslem religious authorities. Broadly speaking, however, the rabbinical Courts had jurisdiction over Ottoman Jews in matters of personal status; and in accordance with the British tradition of respecting the established institutions of an occupied or conquered country, the Military Administration in Palestine maintained the jurisdiction of the religious Courts.

In a Proclamation establishing the Courts which was issued during the War in June 1918, after Southern Palestine had been occupied, it was provided that the jurisdiction of the Courts of the Christian and Jewish communities in matters of personal status of Ottoman subjects should be as it was before the Occupation. The only change made was that, where in any case within the jurisdiction of the religious Court the parties were members of different religious communities and one party objected to the

jurisdiction of the religious Court, the case should be transferred to the civil Court. This Proclamation governed the system of Courts for four years, when more exact legislation was called for. The mandate for Palestine, which had been sitting on the knees of the Council of the League for a long period, was finally approved in 1923, and prescribed in art. 9 that respect for the personal status of the various peoples and communities and for their religious interests should be fully guaranteed. " In particular, the control and administration of wakfs shall be exercised in accordance with religious law and the disposition of the founders." The latter part of the clause introduces another matter which, like the law of personal status, is removed from the jurisdiction of the civil Courts.

Wakfs are charitable endowments, similar to our charitable trusts—but the charitable interest may be very remote. In the Ottoman Government they were constituted only according to the Moslem religious law, even though the beneficiaries might be members of non-Moslem communities. But while their constitution was regulated by the Moslem religious Court, their administration was left in the hands of the Court of the community to which the beneficiaries belonged.

The Palestine Order in Council, issued in 1922, which is the constitutional charter of the Government of Palestine, had anticipated the coming into operation of the provisions of the mandate, and contained a number of clauses which gave effect to the principles prescribed. Jurisdiction in matters of personal status is, subject to certain important reservations, to be exercised by the Courts of the religious communities which were established and exercised jurisdiction at the date of the Order ; and for the purpose of the Order, matters of personal status are defined to mean suits regarding marriage and divorce, alimony, maintenance, guardianship, legitimation of minors, inhibition from dealing with property of persons legally incompetent, successions, wills and legacies, and the administration of the property of absent persons. And the religious Courts receive definite jurisdiction also in matters of wakf.

The rabbinical Courts of the Jewish community are then vested with :

(*a*) exclusive jurisdiction in matters of marriage and divorce, alimony and confirmation of wills of members of the community, other than foreigners ;

(*b*) jurisdiction in any other matter of personal status of such persons where all the parties to the action consent to their jurisdiction ;

(*c*) exclusive jurisdiction over any case as to the constitution or internal administration of a wakf or religious endowment constituted before the rabbinical Court according to religious law.

The execution of judgments given by the rabbinical Court can be carried out only through the civil Courts. Application has to be made to the execution officer of the civil Court for a process ; and the opportunity is therefore given to the person against whom the judgment is given to challenge the jurisdiction of the religious tribunal.

An important reservation implied in the Order in Council and made express in local legislation is that, where the religious Court has not exclusive jurisdiction, any party may require a case of personal status to be taken to the civil Courts, which are Courts of general jurisdiction in all matters and over all persons. The effect of the division of jurisdiction is, then, that except in matters of marriage relations, confirmation of wills and the constitution and administration of charitable endowments made according to the religious law, the parties concerned may refer any question to the civil Courts which will apply the civil law. The distinction in the jurisdiction over different matters of personal status, which must at first sight seem curiously complicated, is based on the ground that the non-Moslem religious Courts are to enjoy exclusive authority only over those matters in which they had such authority under the Ottoman régime. Those were questions of marriage, divorce and confirmation of wills. In other matters of personal status the jurisdiction lay with the Moslem religious Court for members of all communities.

It was clearly inequitable to retain this privileged position of the Courts of one religious body ; and it might have seemed a simple solution to give the non-Moslem religious Courts jurisdiction over the members of their community equivalent to that which the Moslem Courts exercise over Moslems. But a simple solution was not appropriate to the complex conditions of Palestine, and particularly the complex conditions of the Jewish community. It would have been regarded as a grave hardship to many Jews if they had been placed under the exclusive jurisdiction of the rabbinical Courts and of the Jewish law in matters of succession and guardianship. The Jewish law has remained in those subjects unprogressive since the Middle Ages, with the result that women have

inferior rights as compared with men. The Moslem law, paradoxically, approximated more closely to modern ideas with regard to the equality of treatment of men and women in these family rights. There was not, indeed, complete equality, but there was less rightlessness of women than in the Jewish system.

While a large part of the Jewish population which holds strictly to the traditional law was prepared to accept the authority of that law in matters of succession and guardianship, another part, and particularly among the immigrant population which has grown up with a more modern outlook, resented the rabbinical rule. On the other hand, to have deprived the rabbinical Courts of all jurisdiction in matters of succession, except confirmation of wills, would have been to place them in a position of marked inferiority to the Moslem and other religious Courts. And so the *via media* was adopted of giving them jurisdiction with the consent of the parties; and further empowering them to administer a civil law of succession, which was laid down by Ordinance of the Government, if the parties so required. That additional refinement was introduced because it was believed that many parties would prefer their family rights to be decided in the religious Court, provided that a law with a more modern view of women's rights were applied by that Court; and the rabbis, for their part, were prepared to apply such a law as the law of the land.

The Succession Ordinance, which was issued by the Government of Palestine in 1923, makes provision therefore for a law of succession which is in general conformity with Western ideas, to be applied by the civil Courts and, at the request of the parties, by the religious Courts. The law, however, was not taken from any Western country, but reproduces an Ottoman law passed by the Young Turks shortly before the War with regard to the succession of land held of the State. That land, known as Miri, which in some ways corresponds with the now defunct copyhold tenure of English law, and comprises nearly all the agricultural land of the country, cannot be disposed of by will, but passes according to a fixed law of inheritance. Under the Ottoman system intestate succession to Miri land was governed by this law for members of all communities, while intestate succession to land held in full ownership (that is, urban land), and to moveable property passed according to the tenets of the religious law. The Jews were in law subjected to the Moslem rule of intestate succession, though in practice the parties adopted a distribution made by the rabbinical authorities.

By the scheme of the Succession Ordinance, succession to Miri land remains, for all persons in the country, subject to the single Ottoman law. Succession to land held in full ownership and to moveable property is governed by a will made either in accordance with the religious law or in accordance with a civil form; or if there is no will, either by the civil law which is identical with that of succession to Miri land, or by the religious law, which, for Jews, gives rights of priority to males over females. Under the Jewish law there is no restriction on the power of disposition by will, and therefore, except for Miri land, which must devolve according to a State law of inheritance, the whole of a man's property may be bequeathed. If, however, no will has been made, the parties may choose to resort to the civil Court and have their shares determined according to the civil law; or, while electing a distribution under that law, may have it carried out by the rabbinical Court.

It should be mentioned that the jurisdiction of the Jewish law and of the Jewish Courts applies normally to Palestinian Jews only. Those Jews in the country who have remained foreign subjects are entitled to have all their matters of personal status, including marriage affairs, determined by the civil Court which applies their national law, or if the national law refers to the domicile, then the law of the domicile. They are, however, entitled to have recourse to the religious Courts if all the parties are agreed. But there is one important reservation, that the religious Courts may not grant a divorce to persons who are foreign subjects. That reservation is introduced in order to avoid the conflict that would arise if persons who by their national law were not entitled to obtain divorce should seek to get dissolution of their marriage from a religious tribunal which takes no account of the European rules of private international law. The effect is that foreign Jewish subjects in Palestine cannot obtain divorce at all, because hitherto the civil Courts (though they may grant judicial separation) have not been invested with a power of granting divorce. Divorce *a mensa et toro* must be sought, if at all, from the national Court, or, for a British subject, from the Court of the domicile. There is, of course, one remedy for a Jewish husband and wife, who, being foreign subjects resident in Palestine, desire to dissolve the marriage bond: that they should become naturalized as Palestinians and thereby come within the jurisdiction of the religious Courts.

A civil law with regard to guardianship and custody of children and of persons under disability has not yet been worked out. A

project of law, following the main principles of recent English legislation concerning guardianship, is under consideration; and pending its enactment it would appear that Jewish parties are prepared to accept the adjudication of the rabbinical Courts in such matters.

There is reason to expect that in the free atmosphere of Palestine, Jewish law will be systematically developed to accord with the liberal views of our time as to the relations of men and women. That development has been impaired by the abnormal conditions of the Jewish communities in Eastern Europe since the Middle Ages. As soon as a Jewish religious centre is established in the national home, the authority of the rabbinical body to change the law would be recognized throughout the diaspora, and Jewish law on matters of family right could be modified, as it was modified in the happier days of the great jurists of Babylon, Persia, Egypt and Spain during what are known as the Dark Ages of Europe.

In the application of the religious law to matters of charitable endowments, there is a freedom of choice similar to that which has been established on matters of personal law. Provision has been made by Ordinance for charitable endowments to be constituted by instruments of the nature of trusts, and to be subject to the control of the civil Court and the civil law. That is an innovation of our making; by the Ottoman Law the only kind of trust which had legal sanction was the Moslem wakf, which was adopted necessarily by members of the other religious communities.

To meet the problem presented by endowments constituted prior to the Occupation before the Moslem religious Court but for the benefit of non-Moslems, it is provided that the guardians or trustees of the charity may convert those endowments within a limited time into civil trusts. If they fail to do so, questions of the administration of the endowment will fall to be dealt with by the religious authority.

Apart from the jurisdiction in matters of personal status which is exercised by the religious Courts applying the religious law, there has been a remarkable development of Jewish tribunals dealing with ordinary civil and commercial matters. They are the tribunals of arbitration, known by the Hebrew title of Mishpat Shalom or Peace Court. These tribunals had their origin before the British Occupation, when the Jewish population avoided as far as possible, and for sufficiently good reason, recourse to the Turkish Courts of the land. It became the practice in each Jewish quarter of a

town and each agricultural village to elect or appoint arbitrators who disposed of any questions that might arise between Jews with regard to contracts and sales, commercial agreements and the like. Their reputation for honesty, fairness, and wisdom often induced the voluntary submission of non-Jews also.

After the Occupation the system of arbitration tribunals was considerably developed; and for a time it was regarded as one of the most characteristic institutions of the national home. A tribunal of appeal was established to which the parties could have recourse from an award made by the local tribunal, and lawyers and jurists—of whom there are enough and to spare in the Jewish population of Palestine—were found to man the appellate tribunal. In the larger towns, also, regular paid members of the Peace Courts were appointed with legal training both in Jewish and European law. It was as rare for Jewish parties who were in dispute about a matter of civil or commercial law to take a case to the Courts of the Palestine Administration as it had been to take it before the War to the Ottoman Courts. But later there was a revulsion. The tribunals of arbitration applied no fixed and definite law and no fixed and definite system of procedure. Their law and their procedure were amorphous and eclectic. Sometimes they would give effect to the rules of Jewish law; sometimes to the rules of a European code; sometimes, and perhaps more often, to what they regarded as principles of general equity and natural justice. Perhaps it was the uncertainty of the law which they administered; perhaps the greater confidence in the Courts of the land which was established after their reorganization by the British Administration; but, anyhow, the resort by Jews to the arbitration tribunals became less regular. In the higher Courts of the Government of Palestine parties are allowed to plead in Hebrew; and in the towns which have a considerable Jewish population there is a Jewish and Hebrew-speaking magistrate and usually a Jewish member of the higher Court. Jewish litigants, therefore, often chose to submit their case to the legal decision of a Jewish judge, or a Court presided over by a British judge, which was final and would be immediately executed, rather than to the arbitrament of one of their Peace Courts, which might not be final because it was subject to challenge before the Courts of the land when it became necessary to execute the award.

Nevertheless, the institution of the Peace Courts has remained a permanent feature of Jewish life in Palestine; and in the villages,

anyhow, if not in the towns, is the normal instrument for disposing of civil disputes between Jewish parties. When Jewish parties go to the Courts in civil matters, their pertinacity and resourcefulness in Palestine, as in other countries, are inexhaustible.

The Government, indeed, encourages resort to arbitration generally, and this year an Ordinance has been passed replacing the Ottoman Law with regard to the procedure and recognition of arbitrations. The Ottoman Civil Code, the Mejelle, contains curious provisions on the matter, several of which were found to be embarrassing; such as that, where there are several arbitrators they must all agree on the judgment; or, again, if the arbitrator receives a mandate to give judgment within a certain time, his jurisdiction ceases at the expiration of that time; or again, that each of the parties may dismiss the arbitrator before he has given judgment unless the appointment has been previously ratified by a judge of the Court. There were difficulties, also, in the Ottoman law with regard to the execution of awards, the provision being that, when the judgment of the arbitrator is referred to a judge of the Court, it is ratified only if the judge finds it in conformity with the law, but if it is not in conformity with the law it must be annulled. The interpretation put on this article, that if the award was not based on the rules of the civil law, it could be set aside, in many cases defeated the purposes of arbitration, involving as it did a rehearing of the whole matter.

However, all the subtleties of Ottoman procedure with regard to arbitration have now been swept away by an Ordinance which adopts the principle of the English Arbitration Act, 1889. A submission, which includes a written agreement to submit future as well as present differences to arbitration, is to be irrevocable unless the contrary intention is expressed therein, or unless by leave of the Court or agreement of the parties. The Court receives power to appoint arbitrators where the parties do not agree, or to supply any vacancy amongst the arbitrators in default of agreement, and an award can only be set aside on the grounds admitted in the English Statute.

The Ordinance facilitates recourse to the "Peace Courts"; arbitrations may be made certain and expeditious. The arbitrators may make rules either based on the *corpus juris Judaici* or on European models. Palestine offers an ideal field for the combination of old tradition and new creation.

THE IMPERIAL CONFERENCE, 1926.[1]

[*Contributed by* PROFESSOR BERRIEDALE KEITH, D.C.L.]

Inter-Imperial Relations.—All the questions on the Agenda affecting Inter-Imperial Relations were referred by the Conference to a Committee of Prime Ministers and Heads of Delegations, of which Lord Balfour was asked to be Chairman. The members of the Committee included the Prime Ministers of Canada, the Commonwealth of Australia, New Zealand, the Union of South Africa, and Newfoundland, the Vice-President of the Executive Council of the Irish Free State, the Secretary of State for India, as head of the Indian Delegation, the Secretary of State for Foreign Affairs, and the Secretary of State for Dominion Affairs. Other Ministers and members of the Conference attended particular meetings.

The Report of this Committee is printed *in extenso* below. It was unanimously adopted by the Conference on the 19th November and was published on the following day. In approving it, the Conference placed on record the great debt of gratitude which it owed to Lord Balfour for the services which he had rendered by presiding over the work of this Committee, and its hope that the Report would prove of permanent value and help to all parts of the British Empire.

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[1] For the convenience of our readers we have printed in full the Report on Inter-Imperial Relations, Cmd. 2768.

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I. **Introduction.**—We were appointed at the meeting of the Imperial Conference on the 25th October, 1926, to investigate all the questions on the Agenda affecting Inter-Imperial Relations. Our discussions on these questions have been long and intricate. We found, on examination, that they involved consideration of fundamental principles affecting the relations of the various parts of the British Empire *inter se*, as well as the relations of each part to foreign countries. For such examination the time at our disposal has been all too short. Yet we hope that we may have laid a foundation on which subsequent Conferences may build.

II. **Status of Great Britain and the Dominions.**—The Committee are of opinion that nothing would be gained by attempting to lay down a Constitution for the British Empire. Its widely scattered parts have very different characteristics, very different histories, and are at very different stages of evolution; while, considered as a whole, it defies classification and bears no real resemblance to any other political organisation which now exists or has ever yet been tried.

There is, however, one most important element in it which, from a strictly constitutional point of view, has now, as regards all vital matters, reached its full development—we refer to the group of self-governing communities composed of Great Britain and the Dominions. Their position and mutual relation may be readily defined. *They are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.*

A foreigner endeavouring to understand the true character of the British Empire by the aid of this formula would be tempted to think that it was devised rather to make mutual interference impossible than to make mutual co-operation easy.

Such a criticism, however, completely ignores the historic situation. The rapid evolution of the Oversea Dominions during the last fifty years has involved many complicated adjustments of old political machinery to changing conditions. The tendency towards equality of status was both right and inevitable. Geographical and other conditions made this impossible of attainment by the way of federation. The only alternative was by the way of autonomy; and along this road it has been steadily

sought. Every self-governing member of the Empire is now the master of its destiny. In fact, if not always in form, it is subject to no compulsion whatever.

But no account, however accurate, of the negative relations in which Great Britain and the Dominions stand to each other can do more than express a portion of the truth. The British Empire is not founded upon negations. It depends essentially, if not formally, on positive ideals. Free institutions are its life-blood. Free co-operation is its instrument. Peace, security, and progress are among its objects. Aspects of all these great themes have been discussed at the present Conference; excellent results have been thereby obtained. And, though every Dominion is now, and must always remain, the sole judge of the nature and extent of its co-operation, no common cause will, in our opinion, be thereby imperilled.

Equality of status, so far as Britain and the Dominions are concerned, is thus the root principle governing our Inter-Imperial Relations. But the principles of equality and similarity, appropriate to *status*, do not universally extend to function. Here we require something more than immutable dogmas. For example, to deal with questions of diplomacy and questions of defence, we require also flexible machinery —machinery which can, from time to time, be adapted to the changing circumstances of the world. This subject also has occupied our attention. The rest of this Report will show how we have endeavoured not only to state political theory, but to apply it to our common needs.

III. **Special Position of India.**—It will be noted that in the previous paragraphs we have made no mention of India. Our reason for limiting their scope to Great Britain and the Dominions is that the position of India in the Empire is already defined by the Government of India Act, 1919. We would, nevertheless, recall that by Resolution IX of the Imperial War Conference, 1917, due recognition was given to the important position held by India in the British Commonwealth. Where, in this Report, we have had occasion to consider the position of India, we have made particular reference to it.

IV. **Relations between the Various Parts of the British Empire.**—Existing administrative, legislative, and judicial forms are admittedly not wholly in accord with the position as described in Section II of this Report. This is inevitable, since most of these forms date back to a time well antecedent to the present stage of constitutional development. Our first task then was to examine these forms with special reference to any cases where the want of adaptation of practice to principle caused, or might be thought to cause, inconvenience in the conduct of Inter-Imperial Relations.

(a) *The Title of His Majesty the King.*—The title of His Majesty the King is of special importance and concern to all parts of His Majesty's Dominions. Twice within the last fifty years has the Royal Title been altered to suit changed conditions and constitutional developments.

The present title, which is that proclaimed under the Royal Titles Act of 1901, is as follows:

> "George V, by the Grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India."

Some time before the Conference met, it had been recognised that this form of title hardly accorded with the altered state of affairs arising from the establishment of the Irish Free State as a Dominion. It had further been ascertained that it would be in accordance with His Majesty's wishes that any recommendation for change should be submitted to him as the result of discussion at the Conference.

We are unanimously of opinion that a slight change is desirable, and we recommend that, subject to His Majesty's approval, the necessary legislative action should be taken to secure that His Majesty's title should henceforward read:

> "George V, by the Grace of God, of Great Britain, Ireland and the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India."

(b) *Position of Governors-General.*—We proceeded to consider whether it was desirable formally to place on record a definition of the position held by the Governor-General[1] as His Majesty's representative in the Dominions. That position, though now generally well recognised, undoubtedly represents a development from an earlier stage when the Governor-General was appointed solely on the advice of His Majesty's Ministers in London and acted also as their representative.

In our opinion it is an essential consequence of the equality of status existing among the members of the British Commonwealth of Nations that the Governor-General of a Dominion is the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain, and that he is not the representative or agent of His Majesty's Government in Great Britain or of any Department of that Government.

It seemed to us to follow that the practice whereby the Governor-General of a Dominion is the formal official channel of communication between His Majesty's Government in Great Britain and His Governments in the Dominions might be regarded as no longer wholly in accordance with the constitutional position of the Governor-General. It was thought that the recognised official channel of communication should be, in future, between Government and Government direct. The representatives of Great Britain readily recognised that the existing procedure might be open to criticism and accepted the proposed change in principle in relation to any of the Dominions which desired it. Details were left for settlement as soon as possible after the Conference had

[1] The Governor of Newfoundland is in the same position as the Governor-General of a Dominion.

completed its work, but it was recognised by the Committee, as an essential feature of any change or development in the channels of communication, that a Governor-General should be supplied with copies of all documents of importance and in general should be kept as fully informed as is His Majesty the King in Great Britain of Cabinet business and public affairs.

(c) *Operation of Dominion Legislation.*—Our attention was also called to various points in connection with the operation of Dominion legislation, which, it was suggested, required clarification.

The particular points involved were:—

(*a*) The present practice under which Acts of the Dominion Parliaments are sent each year to London, and it is intimated, through the Secretary of State for Dominion Affairs, that "His Majesty will not be advised to exercise his powers of disallowance" with regard to them.

(*b*) The reservation of Dominion legislation, in certain circumstances, for the signification of His Majesty's pleasure which is signified on advice tendered by His Majesty's Government in Great Britain.

(*c*) The difference between the legislative competence of the Parliament at Westminster and of the Dominion Parliaments in that Acts passed by the latter operate, as a general rule, only within the territorial area of the Dominion concerned.

(*d*) The operation of legislation passed by the Parliament at Westminster in relation to the Dominions. In this connection special attention was called to such Statutes as the Colonial Laws Validity Act. It was suggested that in future uniformity of legislation as between Great Britain and the Dominions could best be secured by the enactment of reciprocal Statutes based upon consultation and agreement.

We gave these matters the best consideration possible in the limited time at our disposal, but came to the conclusion that the issues involved were so complex that there would be grave danger in attempting any immediate pronouncement other than a statement of certain principles which, in our opinion, underlie the whole question of the operation of Dominion legislation. We felt that, for the rest, it would be necessary to obtain expert guidance as a preliminary to further consideration by His Majesty's Governments in Great Britain and the Dominions.

On the questions raised with regard to disallowance and reservation of Dominion legislation, it was explained by the Irish Free State representatives that they desired to elucidate the constitutional practice in relation to Canada, since it is provided by Article 2 of the Articles of Agreement for a Treaty of 1921 that "the position of the Irish Free State in relation to the Imperial Parliament and Government and otherwise shall be that of the Dominion of Canada."

On this point we propose that it should be placed on record that,

apart from provisions embodied in constitutions or in specific statutes expressly providing for reservation, it is recognised that it is the right of the Government of each Dominion to advise the Crown in all matters relating to its own affairs. Consequently, it would not be in accordance with constitutional practice for advice to be tendered to His Majesty by His Majesty's Government in Great Britain in any matter appertaining to the affairs of a Dominion against the views of the Government of that Dominion.

The appropriate procedure with regard to projected legislation in one of the self-governing parts of the Empire which may affect the interests of other self-governing parts is previous consultation between His Majesty's Ministers in the several parts concerned.

On the question raised with regard to the legislative competence of members of the British Commonwealth of Nations other than Great Britain, and in particular to the desirability of those members being enabled to legislate with extra-territorial effect, we think that it should similarly be placed on record that the constitutional practice is that legislation by the Parliament at Westminster applying to a Dominion would only be passed with the consent of the Dominion concerned.

As already indicated, however, we are of opinion that there are points arising out of these considerations, and in the application of these general principles, which will require detailed examination, and we accordingly recommend that steps should be taken by Great Britain and the Dominions to set up a Committee with terms of reference on the following lines:

"To enquire into, report upon, and make recommendations concerning—

(i) Existing statutory provisions requiring reservation of Dominion legislation for the assent of His Majesty or authorising the disallowance of such legislation.

(ii)—(*a*) The present position as to the competence of Dominion Parliaments to give their legislation extra-territorial operation.

(*b*) The practicability and most convenient method of giving effect to the principle that each Dominion Parliament should have power to give extra-territorial operation to its legislation in all cases where such operation is ancillary to provision for the peace, order, and good government of the Dominion.

(iii) The principles embodied in or underlying the Colonial Laws Validity Act, 1865, and the extent to which any provisions of that Act ought to be repealed, amended, or modified in the light of the existing relations between the various members of the British Commonwealth of Nations as described in this Report."

(d) *Merchant Shipping Legislation*.—Somewhat similar considerations to those set out above governed our attitude towards a similar, though a special, question raised in relation to Merchant Shipping Legislation. On this subject it was pointed out that, while uniformity of administra-

tive practice was desirable, and indeed essential, as regards the Merchant Shipping Legislation of the various parts of the Empire, it was difficult to reconcile the application, in their present form, of certain provisions of the principal Statute relating to Merchant Shipping, viz., the Merchant Shipping Act of 1894, more particularly Clauses 735 and 736, with the constitutional status of the several members of the British Commonwealth of Nations.

In this case also we felt that, although, in the evolution of the British Empire, certain inequalities had been allowed to remain as regards various questions of maritime affairs, it was essential in dealing with these inequalities to consider the practical aspects of the matter. The difficulties in the way of introducing any immediate alterations in the Merchant Shipping Code (which dealt, amongst other matters, with the registration of British ships all over the world) were fully appreciated and it was felt to be necessary, in any review of the position, to take into account such matters of general concern as the qualifications for registry as a British ship, the status of British ships in war, the work done by His Majesty's Consuls in the interest of British shipping and seamen, and the question of Naval Courts at foreign ports to deal with crimes and offences on British ships abroad.

We came finally to the conclusion that, following a precedent which had been found useful on previous occasions, the general question of Merchant Shipping Legislation had best be remitted to a special Sub-Conference, which could meet most appropriately at the same time as the Expert Committee, to which reference is made above. We thought that this special Sub-Conference should be invited to advise on the following general lines:

> "To consider and report on the principles which should govern, in the general interest, the practice and legislation relating to merchant shipping in the various parts of the Empire, having regard to the change in constitutional status and general relations which has occurred since existing laws were enacted."

We took note that the representatives of India particularly desired that India, in view of the importance of her shipping interests, should be given an opportunity of being represented at the proposed Sub-Conference. We felt that the full representation of India on an equal footing with Great Britain and the Dominions would not only be welcomed, but could very properly be given, due regard being had to the special constitutional position of India as explained in Section III of this Report.

(e) *Appeals to the Judicial Committee of the Privy Council.*—Another matter which we discussed, in which a general constitutional principle was raised, concerned the conditions governing appeals from judgments in the Dominions to the Judicial Committee of the Privy Council. From these discussions it became clear that it was no part of the policy of His Majesty's Government in Great Britain that questions affecting

judicial appeals should be determined otherwise than in accordance with the wishes of the part of the Empire primarily affected. It was, however, generally recognised that, where changes in the existing system were proposed which, while primarily affecting one part, raised issues in which other parts were also concerned, such changes ought only to be carried out after consultation and discussion.

So far as the work of the Committee was concerned, this general understanding expressed all that was required. The question of some immediate change in the present conditions governing appeals from the Irish Free State was not pressed in relation to the present Conference, though it was made clear that the right was reserved to bring up the matter again at the next Imperial Conference for discussion in relation to the facts of this particular case.

V. **Relations with Foreign Countries.**—From questions specially concerning the relations of the various parts of the British Empire with one another, we naturally turned to those affecting their relations with foreign countries. In the latter sphere, a beginning had been made towards making clear those relations by the Resolution of the Imperial Conference of 1923 on the subject of the negotiation, signature, and ratification of treaties.[1] But it seemed desirable to examine the working

[1] This Resolution was as follows:

"The Conference recommends for the acceptance of the Governments of the Empire represented that the following procedure should be observed in the negotiation, signature, and ratification of international agreements.

"The word 'treaty' is used in the sense of an agreement which, in accordance with the normal practice of diplomacy, would take the form of a treaty between Heads of States, signed by plenipotentiaries provided with Full Powers issued by the Heads of the States, and authorising the holders to conclude a treaty."

I.

"1. *Negotiation.*

"(*a*) It is desirable that no treaty should be negotiated by any of the governments of the Empire without due consideration of its possible effect on other parts of the Empire, or, if circumstances so demand, on the Empire as a whole.

"(*b*) Before negotiations are opened with the intention of concluding a treaty, steps should be taken to ensure that any of the other governments of the Empire likely to be interested are informed, so that, if any such government considers that its interests would be affected, it may have an opportunity of expressing its views, or, when its interests are intimately involved, of participating in the negotiations.

"(*c*) In all cases where more than one of the governments of the Empire participates in the negotiations, there should be the fullest possible exchange of views between those governments before and during the negotiations. In the case of treaties negotiated at International Conferences, where there is a British Empire Delegation, on which, in accordance with the now established practice, the Dominions and India are separately represented, such representation should also be utilised to attain this object.

"(*d*) Steps should be taken to ensure that those governments of the Empire whose representatives are not participating in the negotiations should, during their progress, be kept informed in regard to any points arising in which they may be interested.

of that Resolution during the past three years and also to consider whether the principles laid down with regard to Treaties could not be applied with advantage in a wider sphere.

(a) *Procedure in Relation to Treaties.*—We appointed a special Sub-Committee under the Chairmanship of the Minister of Justice of Canada (The Honourable E. Lapointe, K.C.) to consider the question of treaty procedure.

The Sub-Committee, on whose report the following paragraphs are based, found that the Resolution of the Conference of 1923 embodied on most points useful rules for the guidance of the Governments. As they became more thoroughly understood and established, they would prove effective in practice.

"2. *Signature.*

"(*a*) Bilateral treaties imposing obligations on one part of the Empire only should be signed by a representative of the government of that part. The Full Power issued to such representative should indicate the part of the Empire in respect of which the obligations are to be undertaken, and the preamble and text of the treaty should be so worded as to make its scope clear.

"(*b*) Where a bilateral treaty imposes obligations on more than one part of the Empire, the treaty should be signed by one or more plenipotentiaries on behalf of all the governments concerned.

"(*c*) As regards treaties negotiated at International Conferences, the existing practice of signature by plenipotentiaries on behalf of all the governments of the Empire represented at the Conference should be continued, and the Full Powers should be in the form employed at Paris and Washington.

"3. *Ratification.*

"The existing practice in connection with the ratification of treaties should be maintained.

II.

"Apart from treaties made between Heads of States, it is not unusual for agreements to be made between governments. Such agreements, which are usually of a technical or administrative character, are made in the names of the signatory governments, and signed by representatives of those governments, who do not act under Full Powers issued by the Heads of the States: they are not ratified by the Heads of the States, though in some cases some form of acceptance or confirmation by the governments concerned is employed. As regards agreements of this nature the existing practice should be continued, but before entering on negotiations the governments of the Empire should consider whether the interests of any other part of the Empire may be affected, and, if so, steps should be taken to ensure that the government of such part is informed of the proposed negotiations, in order that it may have an opportunity of expressing its views."

The Resolution was submitted to the full Conference and unanimously approved. It was thought, however, that it would be of assistance to add a short explanatory statement in connection with part I (3), setting out the existing procedure in relation to the ratification of treaties. This procedure is as follows:

(*a*) The ratification of treaties imposing obligations on one part of the Empire is effected at the instance of the government of that part:

(*b*) The ratification of treaties imposing obligations on more than one part of the Empire is effected after consultation between the governments of those parts of the Empire concerned. It is for each government to decide whether Parliamentary approval or legislation is required before desire for, or concurrence in, ratification is intimated by that government.

Some phases of treaty procedure were examined however in greater detail in the light of experience in order to consider to what extent the Resolution of 1923 might with advantage be supplemented.

Negotiation.—It was agreed in 1923 that any of the Governments of the Empire contemplating the negotiation of a treaty should give due consideration to its possible effect upon other Governments and should take steps to inform Governments likely to be interested of its intention.

This rule should be understood as applying to any negotiations which any Government intends to conduct, so as to leave it to the other Governments to say whether they are likely to be interested.

When a Government has received information of the intention of any other Government to conduct negotiations, it is incumbent upon it to indicate its attitude with reasonable promptitude. So long as the initiating Government receives no adverse comments and so long as its policy involves no active obligations on the part of the other Governments, it may proceed on the assumption that its policy is generally acceptable. It must, however, before taking any steps which might involve the other Governments in any active obligations, obtain their definite assent.

Where by the nature of the treaty it is desirable that it should be ratified on behalf of all the Governments of the Empire, the initiating Government may assume that a Government which has had full opportunity of indicating its attitude and has made no adverse comment will concur in the ratification of the treaty. In the case of a Government that prefers not to concur in the ratification of a treaty unless it has been signed by a plenipotentiary authorised to act on its behalf, it will advise the appointment of a plenipotentiary so to act.

Form of Treaty.—Some treaties begin with a list of the contracting countries and not with a list of Heads of States. In the case of treaties negotiated under the auspices of the League of Nations, adherence to the wording of the Annex to the Covenant for the purpose of describing the contracting party has led to the use in the preamble of the term "British Empire" with an enumeration of the Dominions and India if parties to the Convention but without any mention of Great Britain and Northern Ireland and the Colonies and Protectorates. These are only included by virtue of their being covered by the term "British Empire." This practice, while suggesting that the Dominions and India are not on a footing of equality with Great Britain as participants in the treaties in question, tends to obscurity and misunderstanding and is generally unsatisfactory.

As a means of overcoming this difficulty it is recommended that all treaties (other than agreements between Governments) whether negotiated under the auspices of the League or not should be made in the name of Heads of States, and, if the treaty is signed on behalf of any or all of the Governments of the Empire, the treaty should be made

in the name of the King as the symbol of the special relationship between the different parts of the Empire. The British units on behalf of which the treaty is signed should be grouped together in the following order: Great Britain and Northern Ireland and all parts of the British Empire which are not separate members of the League, Canada, Australia, New Zealand, South Africa, Irish Free State, India. A specimen form of treaty as recommended is attached as an appendix to the Committee's Report.[1]

In the case of a treaty applying to only one part of the Empire it should be stated to be made by the King on behalf of that part.

The making of the treaty in the name of the King as the symbol of the special relationship between the different parts of the Empire will render superfluous the inclusion of any provision that its terms must not be regarded as regulating *inter se* the rights and obligations of the various territories on behalf of which it has been signed in the name of the King. In this connection it must be borne in mind that the question was discussed at the Arms Traffic Conference in 1925, and that the Legal Committee of that Conference laid it down that the principle to which the foregoing sentences gives expression underlies all international conventions.

In the case of some international agreements the Governments of different parts of the Empire may be willing to apply between themselves some of the provisions as an administrative measure. In this case they should state the extent to which and the terms on which such provisions are to apply. Where international agreements are to be applied between different parts of the Empire, the form of a treaty between Heads of States should be avoided.

Full Powers.—The plenipotentiaries for the various British units should have Full Powers, issued in each case by the King on the advice of the Government concerned, indicating and corresponding to the part of the Empire for which they are to sign. It will frequently be found convenient, particularly where there are some parts of the Empire on which it is not contemplated that active obligations will be imposed, but where the position of the British subjects belonging to these parts will be affected, for such Government to advise the issue of Full Powers on their behalf to the plenipotentiary appointed to act on behalf of the Government or Governments mainly concerned. In other cases provision might be made for accession by other parts of the Empire at a later date.

Signature.—In the cases where the names of countries are appended to the signatures in a treaty, the different parts of the Empire should be designated in the same manner as is proposed in regard to the list of plenipotentiaries in the preamble to the treaty. The signatures of the plenipotentiaries of the various parts of the Empire should be grouped together in the same order as is proposed above.

[1] See p. 84.

The signature of a treaty on behalf of a part of the Empire should cover territories for which a mandate has been given to that part of the Empire, unless the contrary is stated at the time of the signature.

Coming into Force of Multilateral Treaties.—In general, treaties contain a ratification clause and a provision that the treaty will come into force on the deposit of a certain number of ratifications. The question has sometimes arisen in connection with treaties negotiated under the auspices of the League whether, for the purpose of making up the number of ratifications necessary to bring the treaty into force, ratifications on behalf of different parts of the Empire which are separate Members of the League should be counted as separate ratifications. In order to avoid any difficulty in future, it is recommended that, when it is thought necessary that a treaty should contain a clause of this character, it should take the form of a provision that the treaty should come into force when it has been ratified on behalf of so many separate Members of the League.

We think that some convenient opportunity should be taken of explaining to the other Members of the League the changes which it is desired to make in the form of treaties and the reasons for which they are desired. We would also recommend that the various Governments of the Empire should make it an instruction to their representatives at International Conferences to be held in future that they should use their best endeavours to secure that effect is given to the recommendations contained in the foregoing paragraphs.

(b) *Representation at International Conferences.*—We also studied, in the light of the Resolution of the Imperial Conference of 1923 to which reference has already been made, the question of the representation of the different parts of the Empire at International Conferences. The conclusions which we reached may be summarised as follows:

1. No difficulty arises as regards representation at conferences convened by, or under the auspices of, the League of Nations. In the case of such conferences all members of the League are invited, and if they attend are represented separately by separate delegations. Co-operation is ensured by the application of paragraph I.1. (*c*) of the Treaty Resolution of 1923.

2. As regards international conferences summoned by foreign Governments, no rule of universal application can be laid down, since the nature of the representation must, in part, depend on the form of invitation issued by the convening Government.

(*a*) In conferences of a technical character, it is usual and always desirable that the different parts of the Empire should (if they wish to participate) be represented separately by separate delegations, and where necessary efforts should be made to secure invitations which will render such representation possible.

(*b*) Conferences of a political character called by a foreign Government must be considered on the special circumstances of each individual case.

It is for each part of the Empire to decide whether its particular interests are so involved, especially having regard to the active obligations likely to be imposed by any resulting treaty, that it desires to be represented at the conference, or whether it is content to leave the negotiation in the hands of the part or parts of the Empire more directly concerned and to accept the result.

If a Government desires to participate in the conclusion of a treaty, the method by which representation will be secured is a matter to be arranged with the other Governments of the Empire in the light of the invitation which has been received.

Where more than one part of the Empire desires to be represented, three methods of representation are possible:

(i) By means of a common plenipotentiary or plenipotentiaries, the issue of Full Powers to whom should be on the advice of all parts of the Empire participating.

(ii) By a single British Empire delegation composed of separate representatives of such parts of the Empire as are participating in the conference. This was the form of representation employed at the Washington Disarmament Conference of 1921.

(iii) By separate delegations representing each part of the Empire participating in the conference. If, as a result of consultation, this third method is desired, an effort must be made to ensure that the form of invitation from the convening Government will make this method of representation possible.

Certain non-technical treaties should, from their nature, be concluded in a form which will render them binding upon all parts of the Empire, and for this purpose should be ratified with the concurrence of all the Governments. It is for each Government to decide to what extent its concurrence in the ratification will be facilitated by its participation in the conclusion of the treaty, as, for instance, by the appointment of a common plenipotentiary. Any question as to whether the nature of the treaty is such that its ratification should be concurred in by all parts of the Empire is a matter for discussion and agreement between the Governments.

(c) *General Conduct of Foreign Policy.*—We went on to examine the possibility of applying the principles underlying the Treaty Resolution of the 1923 Conference to matters arising in the conduct of foreign affairs generally. It was frankly recognised that in this sphere, as in the sphere of defence, the major share of responsibility rests now, and must for some time continue to rest, with His Majesty's Government in Great Britain. Nevertheless, practically all the Dominions are engaged to some extent, and some to a considerable extent, in the conduct of foreign

relations, particularly those with foreign countries on their borders. A particular instance of this is the growing work in connection with the relations between Canada and the United States of America which has led to the necessity for the appointment of a Minister Plenipotentiary to represent the Canadian Government in Washington. We felt that the governing consideration underlying all discussions of this problem must be that neither Great Britain nor the Dominions could be committed to the acceptance of active obligations except with the definite assent of their own Governments. In the light of this governing consideration, the Committee agreed that the general principle expressed in relation to Treaty negotiations in Section V (a) of this Report, which is indeed already to a large extent in force, might usefully be adopted as a guide by the Governments concerned in future in all negotiations affecting foreign relations falling within their respective spheres.

(d) *Issue of Exequaturs to Foreign Consuls in the Dominions.*—A question was raised with regard to the practice regarding the issue of exequaturs to Consuls in the Dominions. The general practice hitherto, in the case of all appointments of Consuls de Carrière in any part of the British Empire, has been that the foreign Government concerned notifies His Majesty's Government in Great Britain, through the diplomatic channel, of the proposed appointment and that, provided that it is clear that the person concerned is, in fact, a Consul de Carrière, steps have been taken, without further formality, for the issue of His Majesty's exequatur. In the case of Consuls other than those de Carrière, it has been customary for some time past to consult the Dominion Government concerned before the issue of the exequatur.

The Secretary of State for Foreign Affairs informed us that His Majesty's Government in Great Britain accepted the suggestion that in future any application by a foreign Government for the issue of an exequatur to any person who was to act as Consul in a Dominion should be referred to the Dominion Government concerned for consideration and that, if the Dominion Government agreed to the issue of the exequatur, it would be sent to them for counter-signature by a Dominion Minister. Instructions to this effect had indeed already been given.

(e) *Channel of Communication between Dominion Governments and Foreign Governments.*—We took note of a development of special interest which had occurred since the Imperial Conference last met, viz., the appointment of a Minister Plenipotentiary to represent the interests of the Irish Free State in Washington, which was now about to be followed by the appointment of a diplomatic representative of Canada. We felt that most fruitful results could be anticipated from the co-operation of His Majesty's representatives in the United States of America, already initiated, and now further to be developed. In cases other than those where Dominion Ministers were accredited to the Heads of Foreign States, it was agreed to be very desirable that the existing diplomatic

channels should continue to be used, as between the Dominion Governments and foreign Governments, in matters of general and political concern.

VI. **System of Communication and Consultation.**—Sessions of the Imperial Conference at which the Prime Ministers of Great Britain and of the Dominions are all able to be present cannot, from the nature of things, take place very frequently. The system of communication and consultation between Conferences becomes therefore of special importance. We reviewed the position now reached in this respect with special reference to the desirability of arranging that closer personal touch should be established between Great Britain and the Dominions, and the Dominions *inter se*. Such contact alone can convey an impression of the atmosphere in which official correspondence is conducted. Development, in this respect, seems particularly necessary in relation to matters of major importance in foreign affairs where expedition is often essential, and urgent decision necessary. A special aspect of the question of consultation which we considered was that concerning the representation of Great Britain in the Dominions. By reason of his constitutional position, as explained in section IV (b) of this Report, the Governor-General is no longer the representative of His Majesty's Government in Great Britain. There is no one therefore in the Dominion capitals in a position to represent with authority the views of His Majesty's Government in Great Britain.

We summed up our conclusions in the following Resolution, which is submitted for the consideration of the Conference:

> "The Governments represented at the Imperial Conference are impressed with the desirability of developing a system of personal contact, both in London and in the Dominion capitals, to supplement the present system of inter-communication and the reciprocal supply of information on affairs requiring joint consideration. The manner in which any new system is to be worked out is a matter for consideration and settlement between His Majesty's Governments in Great Britain and the Dominions, with due regard to the circumstances of each particular part of the Empire, it being understood that any new arrangements should be supplementary to, and not in replacement of, the system of direct communication from Government to Government and the special arrangements which have been in force since 1918 for communications between Prime Ministers."

VII. **Particular Aspects of Foreign Relations Discussed by Committee.**—It was found convenient that certain aspects of foreign relations on matters outstanding at the time of the Conference should be referred to us, since they could be considered in greater detail, and more informally, than at meetings of the full Conference.

(a) *Compulsory Arbitration in International Disputes.*—One question which we studied was that of arbitration in international disputes, with

special reference to the question of acceptance of Article 36 of the Statute of the Permanent Court of International Justice, providing for the compulsory submission of certain classes of cases to the Court. On this matter we decided to submit no Resolution to the Conference, but, whilst the members of the Committee were unanimous in favouring the widest possible extension of the method of arbitration for the settlement of international disputes, the feeling was that it was at present premature to accept the obligations under the Article in question. A general understanding was reached that none of the Governments represented at the Imperial Conference would take any action in the direction of the acceptance of the compulsory jurisdiction of the Permanent Court, without bringing up the matter for further discussion.

(b) *Adherence of the United States of America to the Protocol establishing the Permanent Court of International Justice.*—Connected with the question last mentioned, was that of adherence of the United States of America to the Protocol establishing the Permanent Court of International Justice.

The special conditions upon which the United States desired to become a party to the Protocol had been discussed at a special Conference held in Geneva in September, 1926, to which all the Governments represented at the Imperial Conference had sent representatives. We ascertained that each of these Governments was in accord with the conclusions reached by the special Conference and with the action which that Conference recommended.

(c) *The Policy of Locarno.*—The Imperial Conference was fortunate in meeting at a time just after the ratifications of the Locarno Treaty of Mutual Guarantee had been exchanged on the entry of Germany into the League of Nations. It was therefore possible to envisage the results which the Locarno Policy had achieved already, and to forecast to some extent the further results which it was hoped to secure. These were explained and discussed. It then became clear that, from the standpoint of all the Dominions and of India, there was complete approval of the manner in which the negotiations had been conducted and brought to so successful a conclusion.

Our final and unanimous conclusion was to recommend to the Conference the adoption of the following Resolution:

> "The Conference has heard with satisfaction the statement of the Secretary of State for Foreign Affairs with regard to the efforts made to ensure peace in Europe, culminating in the agreements of Locarno; and congratulates His Majesty's Government in Great Britain on its share in this successful contribution towards the promotion of the peace of the world."

Signed on behalf of the Committee,
BALFOUR, *Chairman.*

November 18th, 1926.

APPENDIX.

(See Section V (*a*).)

Specimen Form of Treaty.

The President of the United States of America, His Majesty the King of the Belgians, His Majesty the King [*here insert His Majesty's full title*], His Majesty the King of Bulgaria, &c., &c.

.....

Desiring .....

Have resolved to conclude a treaty for that purpose and to that end have appointed as their Plenipotentiaries:

The President .....

.....

.....

His Majesty the King [*title as above*]:

for Great Britain and Northern Ireland and all parts of the British Empire which are not separate Members of the League (of Nations),

AB.

for the Dominion of Canada,

CD.

for the Commonwealth of Australia,

EF.

for the Dominion of New Zealand,

GH.

for the Union of South Africa,

IJ.

for the Irish Free State,

KL.

for India,

MN.

.....

who, having communicated their full powers, found in good and due form, have agreed as follows:

.....

.....

In faith whereof the above-named Plenipotentiaries have signed the present Treaty.

AB.....

CD.....

EF.....

GH.....

IJ .....

KL.....

MN .....

(or if the territory for which each Plenipotentiary signs is to be specified:

(for Great Britain, &c.) .....*AB.*
(for Canada) .....*CD.*
(for Australia) .....*EF.*
(for New Zealand).....*GH.*
(for South Africa) .....*IJ.*
(for the Irish Free State) .....*KL.*
(for India).....*MN.*)

Obscurities in the Report.—It must be admitted at once that the Report manifests very plainly signs of compromise and careful adjustment. To many points no direct answer is given, and the trend of events in the Union of South Africa is conclusive proof of the difficulty of making certain what the Report really effected. The declaration of Mr. Tielman Roos, who represents the most advanced school of Nationalist opinion, that the Report removed any necessity for secession, as it opened the way to sovereign independence within the Empire, may be put against the assertion of General Smuts that it merely sets out formally the position for which he worked in 1918 to 1923, and his demand that the Nationalists should show their full acceptance of the Report by the deletion from the party programme of secession as the ultimate objective. The vagueness of the Report, of course, was practically inevitable because the Committee had two quite different conceptions of Empire before them. One view, held, as was inevitable, very strongly by the Commonwealth, New Zealand, and Newfoundland, and in the main by Canada, insisted on Imperial unity as well as autonomy; the other, taken by General Hertzog and the representatives of the Irish Free State, was intent on attaining the greatest amount of independent status, for General Hertzog had held out as his ideal the recognition internationally of the Dominions as sovereign independent states, and Mr. Fitzgerald had pronounced in favour of seeking to secure international recognition of Dominion neutrality in war time. A result which gratified every one must, therefore, be a compromise, in which carefully chosen phraseology, determined by a master in the use of language, presents possibilities of diverse interpretation.

Rejection of Independence.—At first sight, no doubt, it seems as if sovereign independence had been conceded. The Dominions are declared not to be subordinate either in domestic or external matters to the United Kingdom, but to be associated with it merely by a common allegiance and by voluntary membership of the British Commonwealth of Nations. But we are at once warned against taking these terms too seriously by the assertion that equality and similarity appropriate to status do not always apply to function. Moreover the value of declarations so wide in terms is comparatively slight, and the main importance attaches to the detailed arrangements. These, it is clear, do not for a moment contemplate that the Dominions shall possess

sovereign independence. To bring this about no mere declaration by an Imperial Conference would avail. International recognition would have to be sought and a formal notification sent to foreign powers by the Imperial Government, intimating the grant of independence, which these powers would then recognize if they deemed it desirable. Needless to say, no British government [1] would care to face Parliament with a declaration of policy of this sort, and a Canadian or Commonwealth Prime Minister who returned home after obtaining such a declaration would not remain long in office. Nothing has been done in the way of asking foreign nations to concede to the Dominions the right of remaining neutral in British wars. As was certain, the Dominions declined to do more than applaud the British policy which brought about the Locarno pact, but they remained content with the freedom from direct obligation to give aid in the event of Great Britain being driven to war to vindicate the pact. No suggestion was admitted that in such a case the Dominions would not technically be at war, and liable to attack. The point is extremely important; the Dominions still recognize that they are liable at any time to be involved in war by British action, and no compact has even been made that no British declaration of war or peace shall be issued without Dominion assent. The British Government, it is clear, could not consent thus to limit its freedom of action, but, so long as this is the case, it is misleading to talk of complete equality.

Treaty Negotiations.—Even as regards the negotiation of treaties no change of fundamental importance was made. The Report leaves unaltered the rule that treaties proper can be made by the King only; that they can be signed only in virtue of full powers issued by the King on the authority of a recommendation of a British minister, however faithfully he may act in his recommendation on the advice of a Dominion Government; and that ratification can only be expressed in the same way. The idea that the King could act, without any ministerial advice from the Imperial Government, simply on a submission by Dominion ministers, is an impossibility. The people of the United Kingdom would have formally by assent in Parliament to homologate such a mode of procedure, and it may be regarded as most improbable that they would consent that their sovereign should at the same time act as the independent sovereign of a Dominion. But, at any rate, the view that a vital change can be introduced *sub silentio* is inadmissible. A much more plausible opinion is that of Professor Allin,[2] who is indeed convinced that Canada must eventually obtain complete sovereign

[1] So little did Mr. Baldwin hold that any revolutionary action had been taken that he promptly declined to give time for a discussion in December 1926, and Lord Balfour in the House of Lords was not prepared to go beyond the Report in definition.

[2] *Michigan Law Review*, xxiv, 271. American opinion shows a certain inability to understand the Dominion acquiescence in less than full sovereignty. But a weak sovereign state is by no means ideally situated.

status, but who merely holds that the Imperial power of control as regards treaties, though still formally present, is virtually lost, as the right of refusing ratification is as obsolete as that of disallowing acts. This, however, clearly goes too far; that the Imperial Government would refuse assent to a bill purporting to sever the ties between the Irish Free State or the Union of South Africa and the Empire is at present certain; assent could be accorded only after full agreement at an Imperial Conference, where the views of the Empire as a whole can be ascertained. Similarly, if any part of the Empire desired to conclude a treaty gravely injurious to another part, or parts, it would not merely be the right, but also the clear duty, of the Imperial Government to suspend ratification pending full discussion by an *ad hoc* Conference. The days of the subordination of the Dominions to the United Kingdom are doubtless over, but the association of the Dominions in the British Empire—to use the less cumbrous and more intelligible term—brings with it obligations analogous to those which are created by formal treaty between independent states, and the Conference went far in insisting that no part of the Empire shall negotiate heedless of the interests of the Empire as a whole. The resolutions of 1923 as to treaty negotiation left one serious loophole; it was laid down that any part of the Empire desiring to initiate negotiations should inform any other part whose interests it held might be affected. This facultative procedure is no longer approved; in lieu, a clear obligation is laid on any would-be negotiator to inform all other parts, so that they can safeguard their interests. If there arise eventually conflicts, it is clearly not intended that the matter shall be disposed of at the will of any single part; the issue will be one for consultation and compromise. No other mode by which the Empire can be kept a unity is conceivable.

Dominion Ministers to Foreign Courts.—It was inevitable that the Conference should accept gracefully the decision of Canada to send Mr. Vincent Massey to Washington to take charge as Envoy Extraordinary and Minister Plenipotentiary of Canadian relations with the United States.[1] But there is no intention on the part of Canada to dissociate her interests from those of the United Kingdom, or to present Washington with the spectacle of British disunion. The insistence on consultation in regard to negotiation is immediately intelligible in the light of the Irish Free State and Canadian appointments. Under the new rule it will be impossible for any Dominion minister to start negotiations with the United States behind the back of the British Ambassador; needless to say, the reciprocal obligation of the Ambassador has long been effectively recognized. Doubtless there are inconveniences in a general adoption of the model set, but they are certainly far from in-

[1] The original proposal of 1920 that the Canadian Minister should act for the Ambassador in his absence was never approved by Mr. Mackenzie King, and in view of the appointment of an Irish Minister and possible other appointments, has evidently been dropped.

superable. The Conference, it is clear, did not in the slightest desire that foreign states should reciprocate by accrediting ministers to Ottawa, Dublin, or Canberra, and there seems no immediate probability of action in the United States on the lines suggested by Mr. Harvey, whose reported observations seem to rest on the erroneous assumption, widespread in America, that the Conference intended to relax the effective unity of the Empire, instead of rendering it more real by an accentuation of the autonomy of the several parts and an insistence on the mutual duties honourably involved in this autonomy.

Representation at International Conferences.—The Conference removed incidentally all doubt as to the character of the British representation at Washington in 1921. General Smuts has consistently contended that the Dominions there were represented, as at Paris, by distinct delegations; Sir J. Salmond contended that there was but a single Empire representation; there was never any doubt[1] that this was the correct view, and the Conference has adopted it. It is clear that it considers that such a form of representation may often be best suited for the presentation of Empire views at International Conferences of a political character, summoned by such a power as the United States, as opposed to Conferences summoned by the League of Nations, where, of course, the Dominions have distinct representation as League members. But a concession was made to Dominion views in the undertaking given that, if the Dominions preferred the system of distinct representation, efforts would be made to secure that the invitation was couched in such a form as to permit of it; it will be remembered that this was not possible with the United States invitation to Washington in 1921. If the result of such a Conference—however the Empire is represented—is such as to render acceptance by the Empire as a whole desirable, it is clear that the matter must be settled by consultation. The Report naturally evades any direct statement as to whether a convention could be accepted against the wishes of any individual part; no doubt in the long run it might be found necessary to accept the convention, but only subject to the exclusion of the Dominion concerned from any active liability under it, for it is clear that the Conference admitted that no positive liability to take action could be imposed on any Dominion without its assent.

Signature of Treaties.—It is a matter for congratulation that the wholly confusing signature for the "British Empire" will disappear from treaties concluded under the ægis of the League of Nations. That indeed is only a point of form, though important. But a very valuable victory has been achieved for imperial unity by the acceptance by the Conference of the doctrine that the new form of concluding League conventions in the name of the King excludes the implication that these conventions have inter-imperial effect and validity. This negates the

[1] See Keith, *Constitution, Administration, and Laws of the Empire*, pp. 46 ff.; *The Times*, July 18, 1921.

idea that, as members of the League, the Dominions in League matters owe to the United Kingdom and one another the same obligations as to foreign members of the League. It admits the peculiar unity of the Empire, and tacitly but effectively disposes of the Irish Free State claim that her treaties with the United Kingdom are such international engagements as could form the subject of League intervention or reference to the Permanent Court of International Justice. The last result is specially happy, because the arguments in strict law for the Irish Free State contention were quite serious,[1] and the Free State representatives by accepting the new doctrine have disabled themselves from further support of their plausible thesis.

Imperial Consultation.—Great stress is laid by the Report on the principle, hitherto far too often neglected, that the duty of the parts of the Empire in matters of foreign affairs is to co-operate by consultation in advance. The need for such action has been brought home to the Dominions by the issue of the attitude of the Permanent Mandates Commission of the League of Nations towards mandatory powers. Faced by a common danger of what they regarded as undue interference or at least demand for information, the different Empire Governments have united in defence,[2] and this at least is all to the good, though it may be doubted whether the Permanent Commission is not justified in taking seriously its functions, and the critical attitude of the Empire may be regretted. Consultation again has brought about the sensible decision that no part of the Empire should accept compulsory arbitration by the Permanent Court without further discussion with the rest of the Empire. We may, therefore, hope to see in future some effort made to co-ordinate views before the meetings of the League Assembly. It remains an unsolved problem why so obvious a step was not adopted in the first days of the Assembly.[3] It may possibly have been due to fear lest the distinct position of the Dominions might be obscured; if so, this dread should long since have vanished, and the value of united opinion should now be obvious. Moreover it is clear that the rule of consultation before negotiation applies not merely to treaties proper but to informal agreements of every kind. This is a step in advance, and we may hope that the new rule will minimize the risk of any Dominion entering into an agreement with a foreign power by non-treaty negotiation on terms which might injure another Dominion. It is obvious that, if the rule of consultation had been confined to treaty

[1] See *Journal of Comparative Legislation*, Third Series, vol. iii, pt. 1, pp. 108, 109.

[2] In a letter in *The Times*, April 29, 1920, the desirability of common Imperial action as mandatory powers was pointed out by me, and it is interesting to find that experience has resulted in the adoption of united effort. The fact that the Empire has but one Council representation renders it imperative that he should not act for the United Kingdom alone.

[3] Cf. Keith, *War Government of the British Dominions*, pp. 176 f. For Sir R. Borden's conversion to this view, see *Journal of Comparative Legislation*, Third Series, vol. vii, pt. 4, p. 199.

procedure, its effect could easily have been evaded by adoption of the form of agreements between governments, and the extension of the principle to these also prevents such an outcome. Doubtless in the case of informal agreements no means of enforcing the rule exist, but that it has been laid down is of value, and it may be assumed that in accepting it the Dominions have every intention of living up to the principle, and are wholly opposed to entering into any relation with a foreign power, which would operate adversely to the interests of any other part of the Empire.

Consular Exequaturs.—No point of importance is involved in the decision formally to ask the consent of the Governments of the Dominions to the appointment of foreign consuls *de carrière*. The practice by which in all other cases they were consulted, but not as regards consuls *de carrière*, was merely based on the consideration that the Dominion Governments could have no knowledge derogatory to any consul *de carrière* and, therefore, would and did not wish to be consulted. The new procedure is innocuous, involves no delay in the process of recognition, and the decision that the exequaturs should be countersigned by a Dominion minister is a graceful recognition of Dominion status. Internationally, of course, the matter has no significance; consuls are not diplomats, and it is not even proposed to cut out transmission through the Imperial Government and its intervention.

Limits of Autonomy in Domestic Affairs.—Though the Conference was ready to assert the absolute freedom of the Dominions from Imperial control as a matter of principle, it found the application of the doctrine a much more serious issue. General Smuts would readily have taken up the question in 1921, but he was confronted by the determination of Mr. Hughes to insist that the Dominions were already completely free and that they had no more worlds to conquer. The Conference, therefore, could do no more than indicate the points on which they would wish expert advice before the matters could be adjusted. Moreover they proceeded with remarkable caution with regard to the whole issue. It was willingly recognized that, as a rule, the Imperial Government should not tender advice on Dominion legislation contrary to the views of a Dominion Government, but even this statement rests on a fundamental principle, which is disapproved by supporters of the extreme form of the autonomy doctrine, for it concedes the right to advise as appertaining to the Imperial Government, and negatives the view that the King can be advised directly by a Dominion Government. Moreover there are excepted from the rule cases where reservation is required under constitution acts and other Imperial acts, so that the principle is reduced to the commonplace doctrine already in full operation that Imperial advice differs from Dominion advice merely when Imperial interests are deemed to be deeply concerned. Mr. Baldwin on November 25 hastened to remove any doubt on this head by insisting that,

even if the Governor-General should cease in other respects to be the representative of the Imperial Government, he would nevertheless retain this capacity and duty as regards reservation of bills. The reason for this attitude is simple enough; a bill to provide for the secession of the Irish Free State or for some measure vitally injurious to the safety or essential interests of the United Kingdom would not be allowed to pass by any British Government, and, however little probability there may be of any such measure, the power to hinder its operation must be retained.[1] The same principle applies to the Colonial Laws Validity Act; it cannot be swept away without leaving the British North America Act and the whole constitution of Canada without protection, and the relations of the Irish Free State and Great Britain would be meaningless without it. Nor should it be forgotten that the power of disallowance is one of the factors on which was based the admission of Dominion loans to rank as trustee securities, and that, if it disappears, some substitute (*e.g.* arbitration) must be provided.

Extra-territorial Legislation.—On this topic[2] it is surprising that no greater progress was made, and it is to be hoped that the Expert Committee will evolve something effective. There are several difficulties to be faced. It will not suffice to give powers to the central legislatures of the Commonwealth and Canada alone; if extension is desirable, as is doubtless the case, it must be considered very carefully how far provincial powers in Canada and State powers in Australia should be enlarged. Moreover, it must be made clear that it is the Parliaments and not the Courts which are to decide when extra-territorial legislation is necessary for the peace, order, and good government of a Dominion. Otherwise every attempted exercise of legislation will be open to challenge in the Courts, a result which is wholly contrary to the doctrine of equality with the United Kingdom, whose legislation, if expressed to operate extra-territorially, is binding on every Court in the British dominions.

Judicial Appeals.—Autonomy is clearly inconsistent with compulsory appeals, but the Irish Free State was denied authority to determine the appeal, doubtless because it is the obvious and effective safeguard of the supremacy of the treaty of 1921 over all Irish legislation and administration. The appeal in constitutional matters cannot be taken away by any Irish legislation even under the constitution,[3] and it is clear that the Imperial Government was not willing to give the Free State the power possessed by the Union of South Africa to legislate, subject to reservation, to extinguish the appeal. It is obvious that Canada would be seriously embarrassed if any other Dominion dropped the appeal; it would then be argued, on the one hand, that it was inconsistent with

[1] Hence the decision not to give at once full powers as to merchant shipping to the Dominions, but to refer the matter to a special Conference to be held contemporaneously with the meeting of the Expert Committee. The questions now referred are those raised in *Imperial Unity and the Dominions* (1916), pp. 590 ff.

[2] See *Journal of Comparative Legislation*, Third Series, vol. vii, pt. 1, pp. 103 ff.

[3] *Ibid.*, vol. viii, pt. 4, p. 286.

Canada's position to accept what other Dominions had rid themselves of, while on the other hand, Quebec will not assent to the abolition of the final voice of the Privy Council, regarded as the best safeguard for her provincial rights, her language, and her religion.

The Position of the Governor-General.—Lord Byng's error has had a rapid result in the formal decision by the Conference that the Governor-General[1] must be regarded as bearing towards Dominion administration the same position as the King towards British administration. This, of course, is the principle fought consistently for by Mr. Mackenzie King through his electoral campaign, and the Conference decision disposes finally of the wholly unfounded assertion made in the British Press that the constitutional issue was of little importance. This decision, however, is accompanied by a further proposal which is merely facultative, namely that of passing over the Governor-General as the channel of correspondence with the Imperial Government. There is, of course, no objection in principle to this course; the Prime Ministers of the Dominions already communicate direct with the Prime Minister of the United Kingdom when they please, and it might well have been decided to let the External Affairs Departments of the Dominions deal direct on all foreign issues with the Foreign Office, cutting out the Dominions Office as in this matter a needless postbox. This suggestion was thrown out by Mr. Fisher at the Conference of 1911, and is much more apposite now that the great mass of important communications with the Dominions is made up of despatches and telegrams on Foreign Affairs for which, after all, the Foreign Office must be responsible. Whether, however, it is necessary to leave out the Governor-General, will be decided for each Dominion; Lord Byng's indiscretion will have doubtless a decisive effect in the case of Canada in eliminating the Governor-General's intervention, but that need not apply generally; in the Free State ministers clearly prefer not to correspond through Mr. Healy. With a certain lack of humour or sense of realities the Conference was insistent on the duty of keeping the Governor-General fully informed, even if he is omitted as a means of communication; it may safely be assumed that this principle will be given little practical effect.

British Representatives in the Dominions.—A further facultative proposal is that of sending to the Dominions British officials charged to represent British interests, and in special to keep in touch with Dominions' views on foreign policy. There is nothing unreasonable in the idea, which points to the day when with development in the Dominions such a system will become normal and regular. But for the present it would usually be rather a needless procedure, unless indeed the British diplomat accredited to Canberra served to console the Governor-General for his enforced residence at that not over-promising capital. Canada offers the obvious field for experiment.

[1] Or Governor in Newfoundland, but not other Governors, or Lieutenant-Governors in Canada.

The Australian States and the Report.—It was a very curious error which induced the Premier of Victoria to head a protest from the States against any interference in regard to their constitutional relations to the Imperial Government without their consent. There was never, of course, any idea of affecting the States in any way at a Conference where they are not recognized, and at which, therefore, no government has or claims any right to speak for them. At most it might be argued that the effect of the Report would be that communications from State Governors might be dealt with by the Commonwealth ministry and not by the Governor-General. Such a proposal would clearly not fall within the intention of the Report, and the agitation seems to have speedily been dropped with a realization of the true position.

The Royal Title.—Nothing can be said for the change made in the royal title, because, if it gratifies the Irish Free State by a hint [1] that the present political separation is transient, it equally is a source of dissatisfaction to Northern Ireland. Moreover the change of form might well have been accomplished without the dropping of the terms " the United Kingdom of Great Britain." That style is due to the union with Scotland, and has nothing whatever to do historically with the further addition of Ireland to the union of the Crowns. All that was really requisite to gratify the Free State was to let the title read, " the United Kingdom of Great Britain, Ireland, and the British Dominions beyond the Seas." Unluckily the idea in the Free State appears to be ineradicable that United Kingdom implies that Ireland as a whole is united to Great Britain, and this error has had its effect on the style. The change, of course, in no way meets Republican ambitions except in so far as it harmonizes with their demand for a reunited but Republican Ireland. Another innovation, but only in the phraseology of the Report, seems to have caused some misunderstanding. The term " His Majesty's Government in Great Britain " is contrasted with His Majesty's Governments in the Dominions, and it appears to have been thought in Australia that in some new sense Dominion Governments are now the Governments of the King. But Dominion and State or Provincial Governments have always been His Majesty's. The new way of referring to the Imperial Government seems to have no merit; it would be less cumbrous to say " British Government " if Imperial is disliked. But His Majesty's Government in London is unquestionably in any strict sense of the term an Imperial Government, and there seems no reason why the term should be dropped in favour of an inaccurate and awkward form, which differentiates quite unfairly against Northern Ireland and ignores the rest of the Empire.

The Flags of the Dominions.—It is natural that the Report has in-

[1] Any political intent has, of course, been hastily denied by the British Government, but the Irish Free State would not have been satisfied with the alternative of " Great Britain and Northern Ireland," leaving the Free State to be included in the Dominions beyond the Seas.

duced the view in South Africa that the demand for a distinctive flag is one which can properly be pressed on without regard to the feelings of those who contend that any flag should contain in part the Union Jack.[1] The position, of course, presents a real difficulty only as regards use for naval purposes. The Irish Free State, which has adopted a distinctive flag, had declined hitherto to legalize its use in the sense of legislating with regard to it, and the recognition of any flag appertains under the Merchant Shipping Act, 1894, to the British Government. But, of course, logically, it is impossible to hold that its wishes should prevail in a matter of this kind, however strong a case can be made for uniformity of usage as regards merchant shipping.

[1] The ideal, of course, is the use of the Union flag with a distinctive addition for each Dominion; hence General Smuts's plea for a flag which should combine it with the old Republican flags.

THE DIVORCE LAW OF NEW ZEALAND.

[*Contributed by* James Christie, Esq., LL.M., *Parliamentary Law Draftsman.*]

Though by virtue of the Constitution Act (15 & 16 Vict., c. 72, Imperial), New Zealand had enjoyed its own Legislature since 1854, no legislation relating to divorce was passed in New Zealand until 1867. In that year the Divorce and Matrimonial Causes Act was passed; this Act was an adaptation of the English Act of 1857 and was practically a rescript of legislation that had already been passed in the State of Victoria (Australia).

With the parliamentary practice of the present day in mind, it is surprising to find that the introduction of such an important measure was left to a private member of the Legislative Council (an appointed and not an elective Chamber). The Government of the day excused itself from promoting divorce legislation on the ground that it was doubtful whether such a law was *intra vires* of the New Zealand Legislature. As a matter of fact, the Act when passed was reserved for Her Majesty's assent, and no questions appear to have been afterwards raised as to the sufficiency of the authority of the Legislature to pass it.

Prior to the commencement of the Act of 1867, no divorces had been obtained in New Zealand. It was asserted in debate that people desirous of obtaining divorce had left New Zealand and taken up residence in one or other of the Australian States in which a divorce law was operative. It was assumed, too, that divorce by private Act of the New Zealand Legislature would have been effective, but this remedy was never resorted to. Curiously enough, the first private Divorce Act of the New Zealand Parliament was passed in 1926, when a private Act was successfully promoted dissolving the marriage of a woman who, at the age of eighteen years, had married, in ignorance of the fact that her husband was an habitual criminal.

The Act of 1867 provided remedies for two classes of dissatisfied spouses. In the first place, provision was made for "decrees of judicial separation" (having the same effect as divorce *a mensa et thoro* in England). A decree of judicial separation was obtainable either by husband or by wife on the ground of adultery, or of cruelty, or of desertion without cause for a period of two years.

The second remedy was a decree for the *dissolution* of the marriage (carrying with it the freedom of remarriage), and it is in this wider sense that the term "divorce," without qualification, is generally used. The

Act of 1867 distinguished between husbands and wives in respect of the grounds on which a petition for divorce (that is, for dissolution of marriage) could be granted. A husband's petition could be based on the adultery of the wife, committed since the celebration of the marriage. A wife's petition, on the other hand, could not be based on adultery without more; she was required to prove that her husband had been guilty of incestuous adultery, or of bigamy with adultery, or of rape, or of sodomy, or of bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensa et thoro* under the law in force in England, or of adultery coupled with desertion without reasonable excuse for two years or upwards.

The grounds of divorce remained unaltered until the passing of the Divorce Act, 1898, when the invidious distinction made by the original Act between the rights of injured husbands and injured wives was abolished, and either party to a marriage was entitled to petition for a divorce on any of the following grounds:

(1) That the respondent had since the celebration of the marriage been guilty of adultery;

(2) That the respondent had without just cause wilfully deserted the petitioner, and without any such cause left him (or her) continuously so deserted during five years or upwards;

(3) That the respondent had during four years and upwards been an habitual drunkard and had either habitually left his wife without means of support, or habitually been guilty of cruelty towards her; or, being the petitioner's wife, had for a like period been an habitual drunkard, and had habitually neglected her domestic duties and rendered herself unfit to discharge them;

(4) That the respondent had been convicted and sentenced to imprisonment or penal servitude for seven years or upwards for attempting to take the life of the petitioner.

The law as amended in 1898 was not further altered until 1907, when two further grounds of divorce were added, namely:

(1) That the respondent had been convicted of the murder of a child of the petitioner or respondent;

(2) That the respondent was a "lunatic" or person of unsound mind, and had been confined as such in an asylum for a period or periods not less in the aggregate than ten years within twelve years immediately preceding the filing of the petition, and was unlikely to recover. In 1912 this period of ten years was reduced to seven years and the period of twelve years was reduced to ten years.

In 1920 the law was again amended, so as further to facilitate divorce in cases where the marriage relationship had ceased in fact. Minor alterations were then effected with reference to divorce on the grounds of (1) unsoundness of mind; and (2) of attempted murder of, or the wounding or doing actual bodily harm to, the petitioner or a child of the petitioner or respondent. Two amendments of major importance

were made by the same Act. The first of these was the restoration as a ground of divorce of the failure on the part of either spouse " to comply with a decree of the Court for restitution of conjugal rights." S. 3 of the Divorce and Matrimonial Causes Amendment Act, 1920, is in the following terms :

If the respondent shall fail to comply with a decree of the Court for restitution of conjugal rights, such respondent shall thereupon be deemed to be guilty of desertion without reasonable cause, and a suit for dissolution of marriage may forthwith or at any time thereafter be instituted, and a decree *nisi* for the dissolution of the marriage may, in the discretion of the Court, be pronounced on the ground of desertion, although the period fixed by the principal Act in the case of desertion may not have elapsed since the failure to comply with the decree for restitution of conjugal rights.

Similar provision had been made in the amending Act of 1898, but was repealed in 1907, by reason of comments made by one of the judges, who in a case before him referred to the proceedings as a " farce," implying that petitions to the Court for orders of restitution were in effect collusive devices to secure divorce without the parties being under the necessity of waiting for the expiration of the period of desertion prescribed as a ground for divorce. Whatever may be the practice of parties, it is, however, to be noted that the Court is bound to refuse to make an order of restitution if it appears that there is no real desire on the part of the petitioner to resume cohabitation.

In *Morris* v. *Morris* (1924), New Zealand Law Reports, Mr. Justice Salmond, following the English authorities, says (in delivering the judgment of the full Supreme Court) :

One of the essential conditions of a suit for restitution of conjugal rights is the sincerity or good faith of the petitioner. By sincerity or good faith is meant a sincere desire on the part of the petitioner for the return of his wife and the resumption of normal matrimonial relations, together with a genuine readiness and willingness to receive her and to do his duty to her as a husband. The petitioner is sincere within the meaning of this rule only if he really and honestly desires to obtain that which he asks for in his petition. If he has no such desire, and his true object in taking proceedings is the ulterior purpose of obtaining a divorce in consequence of his wife's disobedience to the decree, his application for restitution is not made in good faith, and his petition will be dismissed. If, however, he is in truth genuinely desirous that his wife should return to him, and is genuinely ready and willing to do his duty to her if she does return, the Court will not attribute to him a want of good faith merely because he contemplates or intends consequential proceedings in divorce in the event of her refusal to obey the decree. The same principles apply to a petition for restitution by a wife also.

And later in the same case :

We think that the rule as to sincerity established by the English authorities ought to be applied by this Court in the exercise of the discretionary authority conferred upon it in suits for restitution. Indeed, considerations of public policy render such a rule more imperative here than it is in England, inas-

much as disobedience to a decree of restitution in this country is immediately and *per se* a ground of divorce. Unless sincerity is held to be an essential condition of relief, the procedure of a suit for restitution, followed immediately by disobedience and a suit for dissolution, would degenerate into a mere scheme of collusive divorce by mutual consent.

The other amendment of major importance made by the Act of 1920 was novel in form as well as in substance. Instead of constituting a fresh ground of divorce (on proof of which the Court would be bound to make an order in satisfaction of the prayer of the petitioner), it conferred a discretionary authority upon the Court. As originally enacted, s. 4 of the 1920 amendment was in these terms :

> It shall be lawful for the Court, in its discretion, on the petition of either of the parties to a decree of judicial separation, or to a separation order made by a stipendiary magistrate or by a resident magistrate, or to a deed or agreement of separation, or separation by mutual consent, when such decree, order, deed or agreement is in full force and has so continued for not less than three years, to pronounce a decree of dissolution of marriage between the parties, and in making such decree and in all proceedings incidental thereto the Court shall have the same powers as it has in making a decree of dissolution in the first instance.

In so far as this section relates to divorce after separation by mutual consent, it proved highly contentious. It was realized, for example, that many women, while satisfied or even obliged in self-protection to be separated from their husbands, were not willing to accept the stigma attaching in the public mind to the status of a woman divorced on a husband's petition. The effect of the provision was probably not fully realized by its authors in Parliament, and steps were taken in the next session to limit the right of a blameworthy partner to get rid by divorce of his innocent spouse. The amendment of 1921 qualifies the provisions of the Act of 1920 (in so far as they constitute separation by mutual consent for not less than three years a ground of divorce), by the addition of a proviso in these terms :

> Provided that if upon the hearing of a petition under this section the respondent opposes the making of a decree of dissolution, and it is proved to the satisfaction of the Court that the separation was due to the wrongful act or conduct of the petitioner, the Court shall not make upon such petition a decree of dissolution of the marriage.

The foregoing is an approximately complete statement of the grounds on which marriage may be dissolved in New Zealand. To the adherents of the contractual view of marriage the restrictive provisions of the 1921 Act are a blot upon the statesmanlike recognition by Parliament of the fact that the marriage relationship originates and subsists in agreement of the parties ; and that when the marriage relationship has ceased in fact, the parties should, on taking the necessary steps, be freed in law from the matrimonial tie. On the other hand, to those who regard marriage solely as a sacrament creating an indissoluble bond, every further facility for obtaining legal freedom from the matrimonial tie

amounts to nothing better than a public flouting of the Divine will. The happy medium in which truth is proverbially to be found has been well expressed by the late Sir John Salmond, in a case which came before him under the 1920 Act, as follows:

All divorce is a good thing so far as it frees the parties from an obligation which is no longer based on that mutual affection and esteem in which it had or ought to have had its origin, and restores to them the right to live their own lives and to seek happiness in the way of honour. But all divorce possesses at the same time the possibility of public mischief, inasmuch as it tends to lessen the sense of responsibility with which men and women enter into marriage, and the fidelity and contentment with which they accept and obey the obligations resulting from it. It is for this Court, in the exercise of the discretionary authority which the Legislature has seen fit to entrust to it, to weigh this private benefit to the parties against this possibility of public mischief, and to grant or refuse a dissolution accordingly.

The attached table, extracted from the *N.Z. Year Book* (1926), shows the extent of the operations of the Supreme Court in its jurisdiction in divorce and other matrimonial causes since 1916.

Year.	Dissolution or Nullity of Marriage.			Judicial Separation.		Restitution of Conjugal Rights.	
	Petitions filed.	Decrees Absolute.	Decrees *Nisi*.	Petitions filed.	Decrees for Separation.	Petitions filed.	Decrees for Restitution.
1916 .	289	198	247	4	—	—	—
1917 .	282	219	221	5	2	—	—
1918 .	380	199	279	4	4	2	—
1919 .	675	336	479	5	1	2	—
1920 .	748	469	574	9	2	4	—
1921 .	796	511	660	5	2	68	43
1922 .	643	522	543	4	1	88	57
1923 .	666	522	603	5	2	77	56
1924 .	768	526	651	11	4	94	65
1925 .	723	612	605	12	4	73	59

THE LEGAL SYSTEM OF ALSACE-LORRAINE.[1]

[*Contributed by* M. Léon Julliot de la Morandière, *Professor of the Faculty of Law, Paris.*]

As a result of the unhappy war of 1870–1 France had to cede to Germany the territories of Alsace-Lorraine. From the month of August 1914 French troops, after forty-four years, reoccupied a part, though in fact a very small part, of these territories. But by the terms of the Armistice in 1918 Germany renounced all her rights over Alsace-Lorraine, and these territories were definitely reincorporated with France under the Treaty of Versailles in June 1919.

The French Government had at once to face the problem of the organization and administration of the recovered territories.

Between 1871 and 1914 Alsace-Lorraine had constituted a *Reichsland* within the German Empire, and had been as such directly subject to the sovereignty of the Emperor. There had been a succession of legislative systems by which the *Reichsland* obtained an ever-increasing measure of autonomy.

Under the Constitution of 1911 Alsace-Lorraine was a State of the Federation, the sovereignty of which resided in the Emperor. At the head of the Government was a *Statthalter* appointed and removable by the Emperor under the counterseal of the Chancellor.

The Parliament or *Landtag* consisted of two chambers, the members of the lower house being elected for five years by universal suffrage. The laws applied were composed of two distinct elements, imperial laws (*Reichsgesetze*) and local laws (*Landesgesetze*). The imperial laws, moreover, came to be more and more important. In order to strengthen her political unity, Germany had felt it necessary to unify her legal system on broad lines. During the last thirty years of the nineteenth century great codes and important special laws were passed and were made applicable throughout the German Empire. In the first years after 1870 the Imperial Law of Nationality, the Commercial Code of 1861, the Law of Bills and Cheques of 1848 and the Penal Code of 1871 were applied to Alsace-Lorraine. Next came the Law of Bankruptcy of 1877, the Code of Judicial Organization of 1877, the Code of Civil Procedure of 1877 and, later, the Code of Social Insurance of 1891. Finally, in 1900 the German Civil Code was substituted for the French Civil Code,

[1] For details see *Répertoire pratique de droit et de jurisprudence d'Alsace et Lorraine*, published in 1925 by M. Niboyet, Professor of the Faculty of Law, Strasburg.

which had been in force up to that time. We may mention also the law of 1907 upon the status of government officials, the law of associations of 1908 and the law as to the contract of insurance of the same year.

Side by side with this imperial legislation there were certain statutes peculiar to Alsace-Lorraine. Among these may be mentioned certain French laws anterior to 1870 which had not been abrogated, *e.g.* the *concordat* and the laws as to religion, a large part of the Forest Code and some others. Besides these there were numerous statutes of the local parliament, such as the laws on the land system of 1889 and 1891, the game laws of 1881 and 1883, the law as to rivers and water rights of 1902 and the law of 1899 as to the execution of the German Civil Code.

It was clearly out of the question to leave the recovered territories permanently under this legal system, and, particularly, under those laws which were purely German.

But it was equally out of the question to abolish by a stroke of the pen the whole of this legislative system and to introduce the French law *en bloc*. Not only would that have created an undue disturbance in the life of Alsace-Lorraine, but, in addition, it was felt that some portions, at any rate, of the local law, based as they were on recent codification in Germany, were indisputably superior to the corresponding provisions of the French law which were somewhat antiquated. Was it not better, therefore, instead of violently introducing the French provisions, to allow those local laws, which were admittedly better, to remain in operation and later on to attempt to extend them, with such adaptations as might be necessary, to the whole of France ?

Accordingly, it was decided in principle to leave in operation in the recovered territories the law in force there on the date of the Armistice with the view of introducing French law little by little. In order to accomplish this end it was necessary, at any rate, for a certain time, to place Alsace-Lorraine under a special system of administration, and to create bodies charged with the duty of preparing the way for the introduction of French law. We shall now explain briefly how far this end has been attained, and in this way we shall be able to give the reader a general idea of the legal system which is now in operation in Alsace-Lorraine.

The system of government of the territories of Alsace-Lorraine occupied after the Armistice by the French troops was first organized by the decrees of November 15 and 26 and December 6, 1918. This occupation, it may be said in passing, was not regarded as a simple military occupation governed by art. 43 of the International Convention of The Hague, but rather as the first stage of reincorporation with France, a reincorporation foreshadowed in the terms of the Armistice and carried into effect afterwards by the Peace Treaty. In accordance with this idea the decree of December 6, 1918, provided that " the civil and penal laws hitherto in force shall continue to be observed," but added, " such legislative provisions as shall be incompatible with the state of things

created by the occupation or shall endanger the security of the French troops shall cease to be executed and shall be replaced by the corresponding provisions of the French law."

In principle officials were allowed to retain their posts, but in each district, Strasburg, Metz, Colmar, a *Commissaire de la République*, occupying the position of prefect, was placed at their head, and, most important of all, the administration was attached to the central authority. It was decided in fact that the general authority should belong to the Prime Minister—*Président du Conseil*—and should be delegated by him to an Under-Secretary of State in Paris with an official staff, *le Service Général d'Alsace-Lorraine*, assisted by an advisory body, *le Conseil Supérieur d'Alsace-Lorraine*.

The existing Courts of law preserved their jurisdiction but were linked on to the French judicial organization, more particularly by making the decisions of the Courts subject to the control of the Court of Cassation. This régime provoked somewhat lively criticism. It was urged in the first place that there was no central body to protect in a suitable manner those interests which were common to the whole of the recovered territories, the local authority being split up among the three *Commissaires de la République*. In the second place it was said that the necessity of every important decision being made in Paris was bound to cause complication and delay. The system was reorganized by a decree of March 21, 1919. Under this a *Commissaire Général* was to be appointed at Strasburg to take charge of the administration, as the delegate of the *Président du Conseil*, of the whole territory of Alsace-Lorraine and was to have under him the Prefects of Strasburg, Metz and Colmar. This *Commissaire Général* was to be assisted by a *Secrétariat Général* and by a large number of administrative departments which were to have for Alsace-Lorraine the prerogatives of Ministries *de facto*. The *Conseil Supérieur d'Alsace-Lorraine* was modified. Under the name of *Conseil Consultatif* its membership was increased, its functions were enlarged and it was in future to sit at Strasburg.

The General Commissary's department at once set about the work of assimilation. In the form of *arrêtés* it brought in what were in fact legislative measures introducing certain parts of the French law, modifying the local laws, and even creating brand-new laws, such as, for example, that concerning the valorization of the mark. But the legality of such measures began to be called in question, and an important law—the *loi du 17 octobre* 1919—concerning the transitory régime confirmed what had been done and laid down the procedure to be followed in future legislation in Alsace-Lorraine.

Art. 3, par. 1 of this law provided that " the territories of Alsace-Lorraine should continue until French laws were introduced to be subject to the laws and regulations now in force."

By art. 4 it was declared that the French law should in principle be introduced by special laws which should determine the modifications

and the delays necessary. It was foreseen that exceptional cases would occur, and by art. 4, par. 2, " in cases where the introduction of French laws was a matter of urgency these might be introduced by *décret* upon the proposal of the *Président du Conseil* after a report of the *Commissaire Général.*" Such decrees must be submitted within a month for the ratification of Parliament. The same procedure might be employed either for the introduction of the French fiscal régime, or in order to adapt local regulations still preserved in force to the French laws which were introduced.

From this moment the work of introducing the French laws bit by bit went on apace. Small commissions of experts (professors of law and practising lawyers) had been formed to prepare drafts of laws and of *décrets.* The texts prepared in this way were as a rule presented for the approval of the Advisory Council (*Conseil Consultatif*) before being sent to Paris to be signed by the President of the Republic or laid before Parliament. Through the continued collaboration of the *Commissaire Général* and the *Conseil Consultatif* an operation of very considerable extent and of a very delicate character was carried through. As a rule the procedure followed was that of simple decree. It was by decrees that were introduced in 1919 the Penal Code, in 1920 the laws concerning artistic, literary, industrial and commercial property, the laws as to nationality, many fiscal laws, many laws relating to labour and, later, part of the rent-restriction laws, laws about inland navigation, etc. In other cases it was thought expèdient to have recourse to a *loi d'introduction.* In this way were promulgated the *loi du 24 juillet* 1921 to prevent and regulate conflicts between the French law and the local law in matters of private law, and notably, the laws of June 1, 1924, which introduced, with certain reservations which will be explained later, the whole body of French civil and commercial legislation.

In proportion, however, to the progress of this assimilation the *raison d'être* for the separate régime of the *Commissariat Général* inevitably diminished. Little by little from 1921 onwards there is a gradual crumbling away of this institution. After December 21, 1921, the special budget of Alsace-Lorraine disappears and is merged in the general budget, a large number of the services of the *Commissariat* are attached, one after another, to the Ministries at Paris—the Department of Justice and some of the financial services in 1921, Mines and Post Office in 1922, Public Works, Penitentiaries, Architecture and Agriculture in 1923, and in 1924 Commerce, Technical Education, etc. After May 1924 the Consultative Council ceased to be convoked, and on November 14 it was suppressed. Finally, the law of July 15, 1925, put an end to the *Commissariat Général* of Strasburg. Thereafter, the three departments of the *Haut Rhin*, the *Bas Rhin* and the *Moselle* are to be administered under the authority of the President of the Council by a Director-General and his staff in Paris. This office is to control on the one hand those services which have not as yet been attached directly to one of the

Ministries in Paris and continue to have their centre at Strasburg—Education, *Cultes*, Social Insurance—and on the other hand it is to act as the *liaison* between the different Ministries as regards those services in the three departments which are attached to them.

After the law of 1925 the introduction of French legislation into the territories has been less frequent, but from time to time portions of the French law have been brought in, particularly in matters of finance. But the articles of the law of October 17, 1919, which permitted French laws to be introduced by decree, expired at the end of July 1926, and since that time new laws can only be introduced by Statute. It must, however, be borne in mind that the assimilation has already been completed over a large part of the legal field.

Before giving a catalogue of those parts of the French law which have been introduced, two preliminary observations of great importance must be made.

1. When a French law is introduced it abrogates every contrary local law and, at the same time, all local regulations which are incompatible with its principles. On the other hand, it introduces by implication, not only the French decrees and regulations appertaining to the law in question, but also the rules laid down by the decisions of the French courts in interpreting this law, the execution of which rules is, moreover, ensured by the control of the *Cour de Cassation*. And it may be added that when a body of French legislation in a determinate legal field, as, for example, in civil matters generally, has been brought into effect in Alsace-Lorraine, then thereafter all new French laws or regulations in this field are applicable in Alsace-Lorraine *ipso facto*.

2. Further, certain parts of the French law have been held to apply to Alsace-Lorraine *ipso facto* without any express introduction. This is so with regard to all Statutes of a constitutional character and the principles involved in them. It follows from the fact that French sovereignty extends over the recovered territories that the rules which determine this sovereignty are of necessity in force there, together with the interpretation given to them by French practice and judicial decisions. In this sense it has been repeatedly held that the *séparation des pouvoirs* as understood in France applies in Alsace-Lorraine and overrules any contrary decision in the local laws.[1]

And, on the same theory, it is admitted that diplomatic treaties signed by France are in force *ipso facto* in Alsace-Lorraine, whereas those signed by Germany no longer apply there.[2]

[1] Cour de Colmar, *Affaire Plug contre État, Revue juridique d'Alsace-Lorraine*, 1921, p. 263.

[2] It has been likewise contended that all the German rules of private international law were abrogated *pleno jure* even before the *loi du 24 juillet* 1921, which expressly introduced the French rules of private international law (Niboyet, *Conflit des lois françaises et des lois locales d'Alsace-Lorraine*, no. 10, p. 21). But this contention has been rejected by the Cour de Cassation (Cass. Civ. 4 juillet 1923, *Revue juridique d'Alsace-Lorraine*, 1923, p. 537).

Over and above these exceptional matters large slices of French legislation have been introduced by numerous decrees or laws.

I. Administrative Organization.—The French administrative areas—departments, *arrondissements*, *cantons* and *communes*—were preserved in 1870 by Germany, the departments being called *Bezirke* and the *arrondissements* styled *Kreise*. Later on the German Government regrouped the areas and established three *Bezirke* divided into twenty-three *Kreise*. France has allowed these divisions to remain, giving to the three districts the name of the departments of the *Haut Rhin*, the *Bas Rhin* and the *Moselle*.

Under the German rule the administration of a *département* continued to be regulated by the French laws prior to 1870, particularly by the laws of May 10, 1838, and July 10, 1866, the general principles of which still remain the fundamental laws upon the subject. But the gradual introduction of French laws has conferred upon the prefects in Alsace-Lorraine pretty well all the powers of prefects in other parts of France except in municipal matters. By the side of the prefect stands the *Conseil Général*, which is after the decree of January 10, 1921, regulated in principle by the French law of August 10, 1871.

At the head of the *arrondissement* is the *sous-préfet* with a *Conseil d'Arrondissement*. The functions of the sub-prefect were in certain directions increased by German laws, and he still preserves these additional powers relating specially to the supervision (*tutelle*) of the *commune*, to the control of places for the sale of intoxicating liquors, and to game-laws, etc. But it is more particularly in regard to the *communes* that the administration of Alsace-Lorraine presents features which are peculiar to it. The French legislation prior to 1870 had, speaking broadly, remained in force until June 6, 1895, when a local law on the subject was promulgated. This was a measure of decentralization which extended the rights of the *communes*. Its essential principle was that the *communes* were divided into two classes—the *grandes communes*, comprising the capital towns (*chefs-lieux*) of the department and nearly all the capital towns of the *arrondissements* on the one hand, and the *petites communes* on the other hand. The *grandes communes* continued to be subject to the supervision (*tutelle*) of the prefect according to the French system, but their municipal councils had the right to decide a large number of questions without requiring, as in France, the approval of the prefect, and especially they were entitled to frame their budget at their own discretion. The small *communes* were under stricter supervision, but this supervision was exercised by the sub-prefect instead of, as in France, by the prefect. Both in the large and in the small *communes* the mayors were nominated by the government and not elected. The French system of electing mayors has been introduced, but otherwise the local legislation remains in force, and at the Congress of the Mayors of France which met at Strasburg in 1923 a formal resolution was passed in favour of the continuance of the present law

until the French municipal law of 1884 should be revised in a more liberal sense.

Among the special features of the administrative organization of Alsace-Lorraine we may mention also :

1. The law of July 23, 1923, as to the status of officials. Under this law officials of all classes holding posts in the recovered territories are incorporated in the *cadres* of the general administrations and made subject to French administrative law. But officials belonging to the local *cadre* who had not opted for the general *cadre* preserve a large number of their former rights, such as security for promotion, pension, etc.

2. The decree of November 26, 1919, as to administrative jurisdiction. The German Government had created a district council for each of the three districts and an imperial council for the whole of the *Reichsland*. The decree of November 26, 1919, suppressed these administrative courts, but it did not set up again the *conseils de préfecture* which exist in the rest of France. These councils have been the subject of many attacks, and their suppression has for a long time been projected. It was accordingly considered sufficient to establish at Strasburg an administrative court for the three departments and to restore to the *Conseil d'État* at Paris its functions as a court of appeal and cassation.

II. Administrative Laws.—There has been no introduction into Alsace-Lorraine of French administrative law *en bloc*. Consequently, in this branch the local law supplies at present the governing rules on the subject. But, seeing that a very large number of French laws have been introduced expressly, there is hardly any subject as to which the French administrative system does not apply in whole or in part.

In three domains only, and three domains which are closely connected with one another, has the legal system, as it existed at the time of the Armistice, been preserved almost intact. These are : (1) the laws as to religion—*régime des cultes*, still based so far as Roman Catholics are concerned on the *Concordat* signed in 1801 by the Pope and the French Government ; (2) the law of associations and of religious congregations ; and (3) the laws as to primary education, including the organization of public schools of a denominational character.

On the other hand, there are many matters as to which French law has been introduced almost in its entirety, such as national defence, weights and measures, the practice of medicine, expropriation for purposes of public utility and use of water power. In other fields the introduction has been only partial, for instance, police, roads and bridges, public works, railways, post and telegraph services, public assistance, etc.

III. Financial Legislation.—The greater part of the rules of the financial régime have been introduced at least so far as concerns State taxes, but the French fiscal law has not been put in force *en bloc*, and therefore any new French law requires to be introduced expressly. Moreover, the system of local taxation for the departments and the *communes* remains in its main lines as before.

IV. Jurisdictions of Courts and Penal Laws.—French criminal law and criminal procedure were introduced *en bloc* in Alsace-Lorraine by a decree, No. 1, of November 25, 1919. But a decree, No. 2, of the same date enumerated a certain number of matters as to which it declared that "the provisions of penal laws concerning these matters are preserved in force provisionally until French laws on the same subject shall come into operation." This referred to penal provisions which were ancillary to other laws and could not be detached from them. The most important of these had to do with education, the laws as to religion, associations, labour, public health, sanitary police, rural police, game, and chemists and druggists.

V. Civil and Commercial Law.[1]—These subjects remained until 1924, governed in principle by the Codes of the German Empire, the Civil Code of 1896 and the new Commercial Code of 1897. It is to be noted that German law, like French law, admits the duality of civil and commercial law. On June 1, 1924, two laws were promulgated, bringing into effect the body of French civil and commercial law. At the same time a certain number of matters were reserved for local legislation. The law relating to the civil law in the first place preserved intact and without any limitation of time the system of associations and foundations. On these matters the local law is in general more liberal than the French law. It allows an association to obtain complete capacity by a simple inscription on the register of associations, and it authorizes a foundation to be made directly by deed *inter vivos* or by a will.

Moreover, the law of June 1, 1924, left in force for a period of ten years a certain number of institutions of the local law which were considered superior to the corresponding institutions of the French law. At the same time, while preserving them, it was necessary to adapt them to the general principles of the Civil Code. In the view of those responsible for the law this is an experiment. If it should turn out that these institutions of German origin work well in the French legal environment, the question will arise in the future whether they should not be extended to the whole of France.[2]

These subjects are as follows:

(1) *Tutorship.* In the French law the tutor is in theory controlled by the family council composed of relatives and friends, but in practice this system does not ensure the adequate protection of the incapable person, and there is little doubt that the system of the law of Alsace-Lorraine, which entrusts the control of the tutor to the judge of the *canton* and makes his court a court of wards (*tribunal des tutelles*), is to be preferred.

(2) *Publicity of the respective rights of the consorts as to property* (*régime*

[1] See *L'Introduction du droit civil français en Alsace et en Lorraine, étude publiée à la Librairie Générale de Droit à Paris en* 1925 *par un groupe de jurisconsultes sur l'initiative de la Faculté de Droit de Strasbourg.*

[2] There is reason to expect that as regards most of these subjects the delay of ten years will be extended.

des biens des époux). For this purpose the matrimonial register has been preserved. In it must be recorded the terms of the marriage-contract and all circumstances affecting the capacity of the consorts. Otherwise these will not be effective against third parties.

(3) *The contract of insurance.* The German law of 1908 has been kept in force pending the decision as to the French draft of a law dealing with this subject.

(4) *Certain provisions regarding the law of succession.* In regard to gifts or legacies made to an heir in the direct line of descent of an interest in an agricultural, commercial or industrial enterprise the rules of the Civil Code as to the proportion of his estate which a testator is allowed to dispose of by will have been found to be too rigid. Certain modifications are permitted by the provisions referred to. The certificate that a person is an heir—*Erbschein*—continues to be legal evidence of the right to succeed as heir.

(5) *Publicity of rights over immoveables.* This is the most important of these reservations. The reform of the system of transfer of real property and real rights has for a long time been under discussion in France. In Germany it had been accomplished by the institution of a General Register (*Livre foncier—Grundbuch*). The law of 1924 preserves in operation in the recovered *départements* the *Livre foncier* kept by the judge of the *canton*. It has, however, been adapted to the general principles of the French law, and particularly to the rule that ownership is transferred by the consent of the parties. The law contains a large number of articles (arts. 36 to 66) and has been completed by a decree of November 18, 1924. It forms one of the most interesting and most original parts of the present law of Alsace-Lorraine.

(6) *Certain provisions of commercial law.* The statute dealing with commercial law has preserved in operation the German provisions, not very numerous, concerning traders' books, commercial mandate (*procura*), mortgage banks, as well as some local rules concerning the trade register (*registre de commerce*) which have been combined with the French laws on the subject. The French law of partnership and companies has been introduced, but at the same time there has been kept in operation the German law of 1892 concerning partnerships with limited liability.[1]

The German laws of May 1, 1889, and December 4, 1899, as to obligatory meetings of shareholders and co-operative societies respectively have been kept in force, and joint-stock companies (*sociétés anonymes*) of the German type are allowed to continue until 1935 side by side with joint-stock companies of the French type.

VI. Judicial Organization, Civil and Commercial, and Procedure.—

[1] In France a law of March 7, 1925, inspired by the legislation of Alsace-Lorraine, has created partnerships with limited liability. This law differs in some points from the German law. It has not yet been introduced in Alsace-Lorraine, but no doubt this will be done shortly.

The judicial organization is governed by the law of July 25, 1923. Art. 1 lays down in principle that the French laws on this subject are to come into force. At the same time there are important differences which it is necessary to point out.

Before 1870 there were two Courts of Appeal, one at Metz, the other at Colmar, and nine civil Courts of First Instance. Under the German rule these were reduced to one Court of Appeal at Colmar and six Courts of First Instance, and for the present this system has been retained.

In principle the local system as to judges of the *cantons* has been preserved. Contrary to the practice in the rest of France, these judges are in Alsace-Lorraine as regards recruiting and promotion assimilated to judges of the civil Courts. Their jurisdiction, moreover, is much wider than that of the French *juges de paix*, though in certain respects, more particularly in criminal matters, it has been reduced since the Armistice.

The local laws as to jurisdiction in commercial matters have been preserved, Commercial Courts of the French type have not been reintroduced. According to the German system commercial cases are tried by a special chamber of the civil Court, composed of a professional judge who presides and two assessors who are traders chosen by election.

The rules of jurisdiction and procedure remain in principle those of the German law. In 1921 the Government prepared a draft law to introduce the French procedure instead of the local procedure. But the French procedure is more antiquated and in many respects more complicated. The draft tried to preserve the more modern rules of the local law, and to combine them with such of the French rules as it seemed desirable to introduce, but this resulted in a third system of a very confused character. The draft was received with much hostility, particularly on the part of the judges and lawyers of Alsace-Lorraine, and it has failed to become law. All that has been done is to introduce by the laws of June 1924 certain rules of procedure closely connected with provisions of the civil or the commercial law which have been put in force. As examples may be given the rules as to possessory actions, as to the restriction of the admissibility of oral evidence in civil matters, as to warranty, as to dilatory exceptions, as to tender and payment into court (*offres réelles*) and as to *tierce opposition*. The French practice has also been introduced as to the *referé*,[1] and as to bankruptcy.

VII. Labour Legislation.—In principle the Code of Social Insurance and the Labour Code (*Gewerbeordnung*) have been left in force, but, whereas the former of these Codes has not undergone any substantial modification since the Armistice, the latter has been very much changed. For many parts of it French laws have been substituted. So, for example, French rules have been introduced as to the collective contract between employers and workmen, and as to the guarantee for the repayment of

[1] Perhaps the nearest equivalent is "applications in chambers."

sums given by an employee to his employer as security for his good conduct.[1]

And the same is true as to the wages of women who do industrial work at home, as to the proportion of wages liable to seizure, as to the wages of married women, as to labour bureaux, as to the eight hours' day, as to laws concerning the sanitary condition of workshops and the security of workers, and as to the inspection of labour. On the other hand, the local law still governs the question of the weekly holiday and those concerning breach of contract between employers and workmen, workshop regulations, apprenticeship to a trade and apprenticeship to a craftsman. The French laws as to trade unions (*syndicats*) of 1884 and 1920 have been introduced, but the local laws on the subject remain in force concurrently, and trade associations may take advantage of both systems.

In this brief account of the position of the law in the three *départements* recovered by France in 1918, I have purposely refrained from any political or theoretical discussion. Enough has been said to show that the work of assimilation has made great progress. The important laws of June 1924 more especially have brought Alsace-Lorraine under the sway of the French civil and commercial codes. In practice no very great difficulties have been caused by this change. It must be remembered that the general principles of the French and of the German law are not very different. On those points where there was a divergence the restoration of the French law was rendered more easy owing to the fact that it had been in force in Alsace-Lorraine until 1900 and that it had been by no means forgotten by the people. There are no doubt important matters which are regulated still and will doubtless long continue to be regulated by the local laws. As to some of these, such as the laws dealing with religion and with education in Church schools, the habits and traditions of the people are very firmly rooted. Any sudden and violent change was not to be thought of. But this is a political problem which lies outside the scope of this article. As to other matters, such as insurance, associations, procedure, the land-book, tutorship and the administration of the *communes*, the local institutions are considered by the great majority of the people to be superior to the analogous institutions of the French law. The best policy then, as we have already said, is to preserve the local laws provisionally in force until France revises her own laws on these subjects, taking the laws of Alsace-Lorraine for her models.

[1] In France employers frequently require cashiers and some other classes of employees to deposit a sum as a security for their good conduct. If the employer became bankrupt, the employee ranked as a simple creditor. The laws in question are to remedy this grievance: *Loi* 18 *octobre* 1917. See Dalloz 1916.4.339. (Note by translator.)

THE MANDATE OVER SOUTH-WEST AFRICA.

[*Contributed by* PROFESSOR E. EMMETT, *Cape Town University*.]

Introduction.—At a time when public attention has been redirected to the mandate system by a much asserted and equally much denied agreement amongst the signatories to the Locarno Pact that a *sine qua non* of Germany's admission to a permanent seat on the Council of the League of Nations should be her appointment as a mandatory State, it is of peculiar interest both to international lawyers and laymen to review the administration of the mandated territory of South-west Africa. The admission of Germany to membership of the League and, *a fortiori*, her elevation to the Council would undoubtedly place her on an equal footing with other members as regards eligibility for a mandatorial post; the presence within the territory of South-west Africa of a large number of European settlers who are either German nationals or German nationals by origin and who form numerically a considerable proportion of the total white population indicate South-west Africa as a suitable subject for such a mandate; whilst the sympathetic attitude of such inhabitants towards such an appointment [1] lends support to the suggestion. It is clear, however, that any step in that direction would be strongly resisted by the present Mandatory, the Government of the Union of South Africa, for it is a coincidence that the territory over which Germany has perhaps the strongest claim to a mandate should be the one over which the Mandatory on several grounds has the clearest claim to retain its mandate.[2] As General Smuts, when Prime Minister of the Union, pointed out,[3]

> The Union has assumed the burden of administration of South-west Africa as much in the interests of the natives and the old European inhabitants as in the interests of its own future safety and happiness. Any suggestion of surrender will therefore be seriously disputed by the Union, which will hold on to it as an integral part of its country. In the general view of the white people in the Union of South Africa and in South-west Africa, the future of South-west Africa is irrevocably identified with the destiny of the Union itself to which therefore the inhabitants, white and black, will have to look for their future happiness and prosperity, subject to the supervision exercised

[1] "The Germans . . . assumed that we were merely holding the territory in trust, with a certainty of reversion to Germany when she became a member of the League."—Letter to Perm. Mandates Commission, April 10, 1924. App. 4th Session.

[2] On the irrevocability of the mandates see Henri Rolin, "*Le système des mandats coloniaux*," *Rev. de Droit Int. et de Lég. comparée*, 1920; Perm. Mandates Commission, 4th Session.

[3] *Supra*, Note 1.

by the Permanent Mandates Commission, which we look upon as a senior partner in the administration of that territory.

The physical juxtaposition and historical relationship of the territories of the Union and of South-west Africa lend some support to General Smuts's statement. Situated to the immediate north of the old Cape Colony, the mandated territory has an area of 322,000 square miles or about three-quarters of the area of the entire Union and possesses many similar physical features. A strip of sandy desert from twenty-five to forty miles wide runs along the coast, while on the east the country merges in the Kalahari Desert. In the north, Ovamboland is far from all European settlement and is still in a primitive tribal state. These three areas take up about half of the whole territory, the rest being within the Police Zone and effectively administered. Relatively to its size the country is sparsely populated, due to the fact that the rainfall is light and precarious, there being no permanent stream from the Orange River on the extreme southern boundary to the Kumene on the northern border. Consequently the breeding of cattle and sheep is the only possible agricultural pursuit save where a small patch of land can be put under irrigation. There is, however, a considerable production of diamonds and copper as well as a lesser production of tin, vanadium and marble.[1]

The first European settlement on the coast was that of Walvis Bay by the Dutch in 1792, but four years later it passed into British possession. As early as 1876 the more important native chiefs within the territory were desirous of coming under the government of the Cape Colony, but nothing was done, in spite of the fact that a special mission despatched from Cape Town in that year reported favourably. In the course of the next few years many German traders settled at various places along the coast, factories were set up and stretches of territory were acquired from the native chiefs. As a consequence of this latter development a lengthy diplomatic correspondence took place from 1883 to 1885 between the Governments of Great Britain, Cape Colony and Germany, and, principally because the Cape Government of the day on being appealed to delayed its decision to accept responsibility, the territory was annexed by Germany from Cape Frio to the Orange River with the exception of the Walvis Bay Settlement. Sovereignty was conferred on the *Deutsche Kolonial Gesellschaft*, which continued to exercise it till 1892, when its responsibilities were taken over by the Imperial Government. The German administration of the territory could not be described as a success. The trade and commerce of the parent country were fostered at the expense of local development so that the colony did not flourish. The native policy adopted provoked a series of rebellions and wars which lasted almost continuously from 1893 to 1908, with the result that the indigenous population was greatly reduced in numbers and available labour diminished. The native insurrections however necessitated the retention of a large trained military force within the territory, so that the

[1] *Round Table*, June 1925.

outbreak of the European War in 1914 found the Germans well prepared and an immediate advance was made against Union territory, where connexion was established with the rebel element. Their repulse early in 1915 by the Union forces under Generals Botha and Smuts was followed by the occupation of the South-west African ports, and a campaign of several months was ended by the surrender of the German forces on July 9. The area was placed under military law and nominally remained so until January 1, 1921, but all troops were withdrawn and civil courts re-established prior to that date.

Grant of Mandate.—By Art. 119 of the Treaty of Versailles, Germany renounced in favour of the Principal Allied and Associated Powers—that is in favour of the United States, the British Empire, France, Italy and Japan—all rights and titles over her overseas possessions in order that all necessary steps might be taken for their administration on a mandatory basis, the general principles of which were enumerated by Art. 22 of the Covenant. At the end of the War it was not possible, it is said,[1] because of the many statements of ideals as to a peace of justice, to carry out an open policy of annexation as established by wartime arrangements, and from this dilemma either of violating such ideals or not securing what had been agreed upon came the mandatory system. Although it is to be hoped and believed that its formulation was based on higher dictates than such a necessity, the statements of leading participants have lent some colour to this view, at least, in so far as the application of the system to the C mandates is concerned.[2] In any event the sponsorship of this method of administration has been ascribed to General Smuts, who is said to have intended that it should apply only to parts of the Turkish territories, whereas in the final settlement President Wilson succeeded in extending it to include the German colonies.[3] This system of national responsibility subject to international supervision was adopted on January 30, 1919, by the Council of Ten, transmitted to the Peace Conference Commission on the League of Nations and with very slight changes incorporated as Art. 22 of the Covenant.

Art. 22 lays down certain principles applicable to territories inhabited by peoples not yet able to stand by themselves, who have ceased to be under the sovereignty of the States which formerly governed them. Their well-being and development form a sacred trust of civilization. Practical effect is given to these principles by entrusting the tutelage of such peoples to advanced nations who are in a position to undertake the

[1] "The United States and the System of Mandates," W. R. Batsell, *Internat. Conciliation*, October 1925, No. 213.

[2] "Mandate C means annexation pure and simple" (M. Candace, *The Contemporary Review*, August 1920). "In effect the relations between the South-west Protectorate and the Union amount to annexation in all but name" (General Smuts in speech at Windhoek, *Cape Times*, September 18, 1920).

[3] The origin of the mandate system has been dated from the Roosevelt correspondence concerning the Algeciras Conference in 1906. P. B. Potter, *American Pol. Science Review*, November 16, 1922.

responsibility; such tutelage to be exercised by them as mandatories on behalf of the League. Three types of mandate are suggested which are to be applicable according to the stage of development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances. "There are territories," the article provides, "such as South-west Africa, . . . which, owing to the sparseness of their population . . . or their geographical contiguity to the territory of the Mandatory and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above-mentioned in the interests of the indigenous population." The safeguards referred to relate to the prohibition of the slave trade, the traffic in arms and liquor, and the training of natives for other than defensive and public purposes. The degree of authority, control, or administration to be exercised by the Mandatory is to be defined by the Council and the Mandatory is to make an annual report to the Council "in reference to the territory committed to its charge," which report is to be examined by a Permanent Commission constituted to advise the Council on all matters relating to the observance of the mandates.[1]

The allocation of the mandates, as contemplated by Art. 118 of the Peace Treaty, was made by the Allied Supreme Council on May 17, 1919, and a Commission appointed by that body settled the draft mandates in July and August of that year. Some delay was caused by the failure of the United States to become a member of the League, but in December 1920 the Council approved and issued the C mandates by virtue of Art. 22.

The mandate for South-west Africa recites that the Principal Allied and Associated Powers have agreed that a mandate shall be conferred on His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa to administer the territory, and that His Majesty on behalf of the said Government has agreed to accept the mandate and to exercise it on behalf of the League of Nations in accordance with its provisions. It gives the Mandatory full power of administration and legislation over the territory as an integral portion of the Union and authorizes him to apply the laws of the Union, subject to such local modification as circumstances may require. The Mandatory is subjected in his administrative and legislative powers to the following restrictions only:

(*a*) he is to prohibit the slave trade and to see that no forced labour is permitted except for essential public works and services; and then only for adequate remuneration;

(*b*) he is to see that traffic in arms and ammunition is controlled;

(*c*) he is to prohibit the supply of intoxicating liquor to the natives;

(*d*) he is to prohibit the military training of natives except for internal police and local defence;

[1] For the constitution of the Permanent Mandates Commission, see A. H. Charteris, "The Mandate over Nauru Island," *B.Y.I.L.*, 1923–4, p. 137.

(*e*) he is to see that no military or naval bases are established in the territory;

(*f*) he is to ensure freedom of conscience, free exercise of all forms of worship and allow missionaries who are nationals of any State member of the League to enter and reside in the territory for the purpose of prosecuting their calling.

One provision of the mandate is that the Mandatory shall promote to the utmost the material and moral well-being and the social progress of the territory. The annual report under Art. 22 is required by the mandate to be to the satisfaction of the Council and to indicate the measures taken to carry out the obligations assumed by the Mandatory. Finally, the consent of the Council is required for any modification of the terms of the mandate; and any dispute between the Mandatory and another member of the League relating to the interpretation or application of the mandate, failing settlement by negotiation, is to be submitted to the Permanent Court of International Justice.

The mandate for South-west Africa (and the C mandates generally) contains no provisions regarding the economic equality or freedom of the trade and commerce of all members of the League, and that is the only real distinction between it and the B mandates. The provisions of the C mandates regarding liquor traffic are, it is true, somewhat stricter than those of the B mandates (the latter only requiring the exercise of a strict control over the sale of spirituous liquors), but the actual text of the B mandates permits of their administration as an integral part of the Mandatory's territory, so that the apparent distinction in that respect created by the terms of Art. 22 disappears.

Legal Position of Mandatory.—As will be seen, the legal position of the Mandatory itself under the mandate system is most vaguely stated and gives rise to several problems of more than merely academic interest. In the first place, as a Dominion and part of the British Empire the legal status of the Union of South Africa itself is not at all clear, but there seems to be little doubt that some measure of international personality must now be ascribed to it. The Union is not only a signatory to the Peace Treaty but also a member of the League of Nations, and as such an independent unit of the Assembly. It has therefore an international status which upon the selection of the Union Government to administer South-west Africa entitled that Government as mandatory to claim the attribute of sovereignty to the same extent as any other Power acting in the same capacity. But to what extent any Mandatory possesses sovereignty is a matter more difficult of definition. The question came up for consideration before the Appellate Division of the Supreme Court of South Africa in the case of *Rex* v. *Christian*,[1] where it was decided, firstly, that the crime of treason could be committed against a State which possessed internal sovereignty even though its external powers

[1] 1923 A.D. 101; *B.Y.I.L.*, 1925, p. 211.

might be limited in certain respects ; and, secondly, that the Government of the Union of South Africa as Mandatory of South-west Africa under the Treaty of Versailles possessed sufficient internal sovereignty to warrant a charge of high treason against an inhabitant of the mandated territory who had taken up arms with hostile intent against the Government of that territory. As was pointed out in the judgment of the Chief Justice, the Mandatory possesses full power of administration and legislation and the restrictions placed upon internal policy are not in themselves inconsistent with sovereignty, being stipulations such as might well be inserted in a treaty between sovereign States controlling undeveloped territories and such as had already been included in certain African conventions. But although the learned judge came to the conclusion that the internal characteristics of sovereignty were present, he found it much more difficult to estimate the effect of the conditions which governed the external relations of the Mandatory, the restrictions in that direction, though very real, being implied rather than expressed. It is clear that some degree of supervisory authority is conferred upon the Council ; it is also clear that the Mandatory is not subject to the sovereignty of any other State (for the League is not a State, nor do the principal Powers constitute one) ; but the position in which the principal Powers, the League and the Mandatory stand to one another is most obscure. There was no cession of the German possessions to the principal Powers, the *animus* essential to a legal cession not being present on either side. As signatories to the Treaty the principal Powers must have intended that such possessions should be dealt with upon a basis new to international law as regulated by Art. 22 of the Treaty. There was then merely a renunciation by Germany in their favour in order that they might take all necessary steps to give effect to the arrangement. This they did by selecting the Mandatories and the matter then passed under the cognizance of the League, it being the duty of the Council to define the terms of the mandate. On accepting the mandate, the Mandatory became obliged to report annually to the Council. But no limit was placed on the duration of the mandate and no sanction was provided for a breach of its terms. It was probably considered that the force of public opinion, and in case of dispute the authority of the Court of International Justice, would ensure the due observance of the mandate. In particular the revocability of the mandate is open to discussion, although assuming the revocability, who has power to revoke—the Council which did not appoint the Mandatory or the principal Powers whose authority appears to be at an end once they have made the appointment ?

The nationality not only of the European settlers but also of the indigenous population in the mandated territories has also formed the subject of much argument [1] and may be suitably discussed in connexion with the question of sovereignty. As the Gordian knot has now been cut by specific resolutions of the Council, its unravelling can only be of

[1] " Mandated Territories," M. H. Lewis, *L.Q.R.*

academic interest, but the Council's solution would appear to be justifiable on legal grounds as well as those of practicability. The problem was apparently left unsettled by the Peace Treaty, although Art. 122 gives the Mandatory power to repatriate *German nationals* from the mandated territory or to make provision as to the conditions upon which *German subjects of European origin* may remain therein, and Art. 127 provides that the native inhabitants of the mandated territories shall be entitled to the diplomatic protection of the Mandatory. If Germany's transfer of her overseas possessions to the principal Powers under Art. 119 constituted a cession, the true view of its legal effect would appear to be that the native inhabitants lost their German nationality [1] without acquiring a new one because the principal Powers possessed no common nationality. Apart from the provisions of Art. 122 the effect would appear to be the same in the case of the European settlers of German nationality. But as has been pointed out,[2] the transaction under Art. 119 is not a cession but a mere placing at the disposal of the principal Powers for the constitution of a mandate system. That system has as its aim the development of the native population, and it is for this purpose Germany relinquished her rights. Consequently so far as the native inhabitants are concerned German nationality disappears, but the new system *sui generis* which is constituted does not fix them with a new nationality but merely entitles them to the diplomatic protection of the Mandatory as provided in Art. 127. As regards the European settlers of German origin, different considerations apply under this interpretation of Art. 119. It is from the point of view of the native inhabitants that Germany relinquishes her rights. So far as European settlers of German nationality are concerned, there is no cession and no loss of nationality and such nationals are left to be dealt with by the Mandatory as he may think fit under the powers given him by Art. 122.

It is interesting to note that the resolutions of the Council embody these conclusions. At its 24th Session in a series of resolutions it decided that the native inhabitants are not invested with the nationality of the Mandatory, that they possess a distinct status which should be designated by some form of descriptive title, and although they may individually and voluntarily obtain naturalization from the Mandatory, they cannot be naturalized by a collective process.

Commission on Future Form of Government.—In September 1919—by Act 49 of 1919—the Union Government obtained from the Union Parliament authority to do such things as might be proper or expedient for giving effect to any mandate that might be issued with reference to South-west Africa and to issue proclamations and regulations in regard thereto. The act specifically authorized the Union Government to repeal, alter, amend or modify any laws in force in the territory, including proclamations issued during the military occupation ; to make new laws

[1] Hall, *International Law* (8th ed.), pp. 686–7.

[2] *Rex* v. *Christian*, *supra*, pp. 108–9.

for the territory, and to delegate its authority to any officer in the territory whom it might delegate to act under its instructions, viz. the Administrator. The Act also provided that the grant of State land, minerals, trading or other concessions, and the alienation of native reserves were not to be dealt with without the specific authority of Parliament.

As has been pointed out,[1] in the Union legislation for the mandated territory of South-west Africa has been passed, not as in Australia under the constitution powers to deal with such territories nor under Imperial authority as in New Zealand, but under the general power to legislate for the peace, order and good government of the Union given in the South African Act, 1909. The validity of the exercise of this power may conceivably be questioned on the score that it is extra-territorial legislation, but it may be defended on the ground that the mandate by inference confers the power to legislate.

In October 1920 a Commission was appointed to inquire into the question of the future form of government in the mandated territory. Following on an interim report by this Commission in November 1920 and the issue of the mandate itself in December of that year, a Proclamation [2] was promulgated constituting an Advisory Council whose functions were to advise the Administrator: (*a*) as to the raising of revenue for the territory; (*b*) as to the appropriation of moneys for public services and the allocation of expenditure; (*c*) as to matters of general policy in relation to legislation and administration, apart from routine matters.

The council consisted of nine members appointed by the Administrator and all its members were persons ordinarily resident in the territory and fully representative of farming, commercial, mining, wage-earning and native interests. The only official permitted to be a member represented native interests.

A large number of proclamations have been issued by the Administrator dealing with a variety of topics, but the general trend of such legislation has been towards the assimilation of territory laws to Union laws. Roman-Dutch law, civil and criminal, as existing in the Cape Province on January 1, 1920, has been declared to be the common law of the territory,[3] a judicial system has been established,[4] and many Acts of the Union Parliament have been enacted by reference. All proclamations, under the direction of Act 49 of 1919, have been laid before the Union Parliament, which may be said to have assumed from the outset ultimate control over the administration of and legislation for the territory. The Union Parliament has indeed in certain cases directly legislated for the mandated territory: in making the Appellate Division of the Union Supreme Court a Court of Appeal from the High Court of the territory [5]; investing the railways and harbours in the Union Government to be worked as part of the Union system [6]; and in

[1] A. B. Keith, *The Constitution, Administration and Laws of the Empire*, p. 294.
[2] Proc. 1 of 1921. [3] Proc. 21 of 1919. [4] *Ibid.*
[5] Act 12 of 1920. [6] Act 20 of 1922.

placing the settlement of Walvis Bay under the territory for legislative and administrative purposes.[1]

The Commission on the future form of government in South-west Africa in its final report dated March 1921 recommended that an essential preliminary to any further grant of self-government was legislation to provide for the acquisition of British nationality by those German subjects domiciled in the territory. The Union Government had not availed itself of the right conferred upon it by Art. 122 of the Peace Treaty to repatriate German nationals from the mandated territory; but on the contrary had used every means of inducement to encourage them to remain, since they formed so large a proportion of the total white population. The Commission considered the alternative methods by which this acquisition of British nationality might be brought about and came to the conclusion that although a method of voluntary naturalization would afford an accurate return of the number of aliens who had become British subjects by their own deliberate act, yet it was possible that a large proportion of the German population would not avail themselves of this method. The Commission therefore recommended a method of automatic naturalization of all Germans domiciled in the territory, without any application being required from individuals, subject to the reservation to each individual of the right to make within a stated period a declaration declining British nationality. Before adopting this recommendation the Union Government sought the approval of the Council of the League, which approval was given in April 1923. Later in that year the matter was discussed in London between General Smuts and two representatives of the German Government, and as a result a memorandum was drawn up and signed by both parties by which the German Government approved the plan of automatic naturalization.[2] The agreement further provided for the education of children through the medium of German and the use of German as an official language,[3] and that German subjects and their children in South-west Africa were not to be called on to serve in military operations against the Reich for a period of thirty years. The principle of automatic naturalization was carried into effect by Act 30 of 1924, which Act also applied the Union Naturalization of Aliens Act, 1910, to the territory and enabled future applications to be received from inhabitants of the territory for British nationality *within* the Union.

Criticism of Administration.—The administration of South-west Africa by the Mandatory has had to undergo searching criticisms by the Permanent Mandates Commission. A fundamental difference in point of view between the latter and the Mandatory lies in the fact that in the eyes of the Commission the mandate system is based on the

[1] Act 24 of 1922.

[2] Treaty Series No. 27 (1924), Cmd. 2220; *B.Y.I.L.*, 1925, p. 189.

[3] By Act 42 of 1925 the official languages are, as in the Union, English and Dutch, but German may be used in the High Court by litigants or their advocates in addressing the Court.

interests of the indigenous population as paramount, whereas the Union Government in South Africa relegates native interests to a secondary position and has extended that policy to the mandated territory. For example, the Nationalists in the Union claim the right of self-determination for the territory as to its future, but this self-determination is to be expressed by the wishes of the European settlers, whose interests cannot obviously be treated as paramount.[1]

One of the features of the administration has been the marking out in the territory of a number of native reserves in which the tribal chief or an appointed or elected headman is responsible to the magistrate for law and order and receives a small salary. These reserves are intended to serve as a means of securing a contented and settled population and as a recruiting ground for labour. The Labour Laws introduced into the territory are decidedly drastic. In areas open to European settlement every native, not infirm or aged, must be in employment unless he has visible means of support, interpreted as the possession of ten head of large stock or fifty head of small stock, and this rule is enforced by a rigid pass law under which the movements of the native are strictly supervised. Ovamboland and Rehoboth are excepted from the system, but Ovambos and Bastaards who leave these areas fall under its provisions. The régime, however strict, is much superior both in intention and execution to that of Germany, but it has been criticized by the Permanent Mandates Commission on the ground that it amounts in fact to forced labour, and at the League Assembly of 1922 it was necessary for the representative of the Union to promise a full inquiry into allegations of inhuman methods of enforcing payments of taxes. In May 1922 the Bondelzwarts, a small tribe of mixed native and European blood inhabiting the extreme southern portion of the territory, resisted the Government on alleged grievances connected with a tax on dogs and other matters. The resistance was crushed with the use of considerable force, the natives being bombed by aircraft. A Commission appointed by the Union Government to inquire into the matter reported that the whole native problem, not only as it affected the Bondelzwarts but as it existed throughout the territory, required the most careful and exhaustive examination in order to bring it into harmony with the idea that the native is a sacred trust to the mandatory State. The Commission strongly deprecated measures directly or indirectly meant to compel labour and passed some strictures on the unnecessary force with which the insurrection had been suppressed. The Permanent Mandates Commission considered the reports of this Commission along with the report of the Administrator at its third session and sharply

[1] General Hertzog, moving second reading of the Naturalization Bill, said: "I have no doubt that eventually South-west Africa will be an integral part of the Union. But I feel this: when that is brought about it must be with the full and free consent of the people. Whether we shall succeed in that will of course depend very much on how we are going to govern that country and how we are going to allow that country to govern itself."

criticized the treatment of the native as illustrated in this particular episode. A rising of the Rehoboth Bastaards early in 1925 was fortunately averted without bloodshed through the adoption of a less threatening attitude by the Administration.

As has been pointed out, the Union territory of Walvis Bay has been attached to the mandated territory for purposes of administration. At its fourth session the Permanent Mandates Commission noted this fact but expressed surprise that the area of Caprivi Zipfel (a narrow strip of territory extending to the north-west of the mandated territory bounded on the north by Angola, on the south by Bechuanaland, on the east by the River Okavango), with an area of 10,573 square miles and a population of 2,000, was being administered by the High Commissioner of South Africa as part of the Protectorate of Bechuanaland.[1]

South-west African Constitution Act.—The main recommendation of the Commission appointed to inquire into the future form of government in South-west Africa was that the existing form of government outlined in the interim report and adopted by Proclamation 1 of 1921 should be succeeded without any intermediate phase by the form of government prevailing in the four provinces of the Union, subject to certain modifications in view of the peculiar circumstances prevailing in the mandated territory. The Commission found it difficult to specify what period should elapse before the change took place, but thought it desirable that it should not do so until the population included at least 10,000 adult male British subjects of European descent.

The recommendation of the Commission and a growing demand among the white population of the mandated territory for a greater measure of self-government have been met by the South-west African Constitution Act[2] of 1925, which has been made possible by the acceptance of British nationality by 3,220 of the 3,474 German nationals domiciled in the territory. By this Act an Assembly is established of eighteen members, of whom six are appointed by the Administrator and twelve are directly elected by the voters, the territory having been delimited into twelve single-member constituencies. The Administrator as executive head is assisted by an Executive Committee of four members elected by the Assembly at its first meeting. The function of this Committee is to carry on the administration in respect of all matters regarding which the Assembly is at liberty to make ordinances. There is also an Advisory Council of eight members, including the Executive Committee and three other nominated members, one of whom is to be selected for his special knowledge of native affairs. The functions of the Council are to advise the Administrator in matters regarding which the Assembly is not competent to make ordinances, including general policy and administration. The fact that the Executive Committee forms the majority of the Advisory Council gives them an effective say both in the legislation and administration of the reserved subjects. The list of subjects which

[1] Act 42 of 1925 continues this partition.

[2] Act 42 of 1925.

fall within the competence of the Assembly is a formidable one, whilst all the reserved subjects are open to discussion in the Assembly and may form the subject of resolutions. The limitation of the powers of the Assembly is on a system differing from that obtaining in the case of Provincial Councils in the Union. In the latter case certain groups of subjects are specially assigned to the provinces as being within their legislative competence. In South-west Africa certain subjects are specially reserved—native affairs, mines, railways, the public service, the judiciary, Courts of law, postal services, immigration, customs, and currency and banking are all matters over which the Assembly is incompetent to deal by legislation save with the prior consent of the Mandatory. These subjects are all permanently reserved, and in addition the organization and control of police, civil aviation, primary and secondary education, the Land Bank and Government lands are matters which for three years are outside the scope of the Assembly and for a longer period unless the Assembly by a two-thirds vote expressly asks that legislative powers be granted. Moreover, although the Assembly has the right to make ordinances on all other matters not specified, such ordinances are subject to the vote of the Administration or of the Governor-General of the Union.

It remains to be seen how far this attempt to combine a measure of self-government with the responsibility of the Mandatory will be a success. The question of entrusting to a scattered white population the control of a country three-quarters the size of the Union and containing 200,000 natives is one of the greatest importance. The mandatory Power is responsible to the Council for the interests of this native population, and that is obviously the reason for the withdrawal of native affairs from the competence of the Assembly and the power of veto reserved to the Administrator over all legislation. Any fuller measure of self-government would have involved a surrender of the Mandatory's powers which could not be done except with the consent of the Council of the League. The Government set up by the Act is purely a white Government. It has been described[1] "as an effectual carrying out of that provision of the mandate which enjoins the Mandatory to promote the material and moral well-being and social progress of the inhabitants by enabling them through their representatives to assume an active responsibility for some of the administrative acts under which they are to live." Such a construction of the provision seems to be rather forced, for its most obvious reference as employed in the mandate is to the native inhabitants, whose concern in the new constitution is almost negligible, limited as it is to an official representative on the Advisory Council. Once again, it would seem, the Mandatory's attention is centred on the territory and its white population. It is to be hoped that if and when the Constitution works freely, the Mandatory will concentrate his attention on the real subject of the mandate, the native population.

[1] Memorandum on the South-west Africa Constitution Bill.

NOTES ON IMPERIAL CONSTITUTIONAL LAW.

[*Contributed by* PROFESSOR BERRIEDALE KEITH, D.C.L.]

Admiralty Jurisdiction in the Dominions. — In connexion with the doctrine of the desirability of removing the fetters on Dominion legislation imposed by the existence of the Colonial Laws Validity Act, 1865, it is interesting to consider the case against Imperial control in the matter of Admiralty jurisdiction made by Professor H. A. Smith.[1] His views are the more interesting in that they do not rest on mere constitutional grounds of propriety, but adduce what appear to him definite facts establishing actual inconvenience and even injustice as the outcome of the present position. It is, therefore, necessary to consider how far this view can be supported. One of the cases adduced can easily enough be disposed of. In *The Camosun*[2] the Scottish builder of a ship for a Canadian firm sought to enforce a mortgage duly registered in the Canadian Exchequer Court at Vancouver, which exercises in virtue of the combined effect of the Colonial Courts of Admiralty Act, 1890, of the Imperial Parliament and Canadian legislation applying it, Admiralty jurisdiction including power to deal with the case of any mortgage duly registered under the terms of the Merchant Shipping Act, 1894. The firm for which the ship was built declared that they were entitled to meet the claim on the mortgage in part by obtaining a deduction from the cost of constructing the ship by reason of an alleged breach of the contract. The Privy Council ruled that this claim could not be set off in any form, and it seems impossible to question the validity of the reasoning of the Judicial Committee. The jurisdiction which can be conferred on a colonial Court in Admiralty matters is restricted by the Act of 1890 to that of the High Court in England in its Admiralty jurisdiction. Now that jurisdiction never extended to cover such a claim as that of the mortgagors of the ship, and accordingly, even if the case had been tried in England, this aspect would not have fallen within the Admiralty jurisdiction of the High Court. There, however, by reason of the wide term of the Judicature Act[3] the Court would have been able, by virtue of the jurisdiction to entertain any equitable defence, to give such effect as might be necessary to the defence pleaded. This was not possible in Canada, but the reason is not, as suggested, any obstacle in the Imperial legislation. It was due simply to the fact that the Exchequer Court of Canada is not given

[1] L.Q.R. xli. 423 ff. [2] [1909] A.C. 597.

[3] See now Supreme Court of Judicature (Consolidation) Act, 1925, ss. 36–44.

by Canadian legislation any general jurisdiction or power to entertain equitable defences. If the Parliament of Canada conferred full civil jurisdiction on the Exchequer Court, the difficulty could hardly have arisen. It may be added that it is very dubious whether in any case the counter-claim was one fit to be decided in Canada. The question of failure to carry out properly a contract for building a ship in Scotland is obviously one which would far more securely be dealt with by the Scottish Courts, the witnesses being Scottish, than at Vancouver.

The Administration of Justice Act, 1920, and the Dominions.—A much more plausible case against the Imperial Parliament is made out as regards the extension of Admiralty jurisdiction by s. 5 of the Administration of Justice Act, 1920. That section swept away the comparatively limited jurisdiction given by s. 6 of the Admiralty Courts Act, 1861, and gave instead an unfettered power to deal with claims arising out of any agreement relating to the use or hire of a ship, or relating to the carriage of goods on a ship, or based on tort in respect of goods so carried. It is contended by Professor Smith that automatically under the terms of the Imperial Act of 1890 this enactment applies to Dominion Courts of Admiralty, and that accordingly the Imperial Parliament in 1920 legislated for the Dominions without consulting them and without even taking care to secure that the Dominion Courts were made aware of the change of the law which, carried out in an omnibus Act, naturally did not attract their attention. It is clear that the latter part of the indictment is correct, for in *The Aledo* [1] the Exchequer Court declined jurisdiction in the case of a claim in respect of damage done to a cargo loaded in Canada for export to Denmark on the perfectly sound ground, if the Act of 1861 alone applied, that the Court had no jurisdiction in the matter, the cargo not being carried into any port in Canada. But the obvious explanation is that the Imperial Parliament never dreamed of legislating for Canada, and this is made perfectly plain by s. 20 of the Act of 1920 which expressly provides that "this Act, except Part II thereof, applies only to England and Wales." Part II, it will be remembered, is the enactment providing for inter-imperial enforcement of judgments, and makes provision for Scotland and Ireland. Professor Smith suggests that this section uses "only" in the sense merely of excluding Scotland and Ireland from the operation of the Act other than Part II, but this is clearly a most implausible construction. But even if there could be any doubt on the matter it is removed by the Supreme Court of Judicature (Consolidation) Act, 1925, which re-enacts s. 5 when dealing with the jurisdiction in Admiralty of the High Court in England and otherwise repeals wholly the section.[2] The truth is that the Act of 1920 never touched the jurisdiction of Dominion Courts; if it had been proposed to do so, it would have been necessary to consult the Dominions. What the Act, and now

[1] [1923] Can. Exch. Rep. 217; cf. *The Istar, ibid.*, 212.

[2] See s. 22, subs. 1 (a) (xii) and the sixth Schedule.

the Act of 1925, does is something quite different. It extends the jurisdiction of the High Court in Admiralty, and, therefore, if it be the desire of any Dominion to extend the Admiralty jurisdiction of its Colonial Court of Admiralty, it is completely at liberty to do so under the Imperial Act of 1890. There is clearly no ground for a complaint of Imperial intervention, when a mere possibility of Dominion action and an increase of Dominion powers is conceded. Professor Smith himself carefully negatives the view actually taken by the Canadian Court in *The Ingelby* [1] that the Merchant Shipping (Stevedores and Trimmers) Act, 1911, applied to Canada. The error of that judgment was undoubtedly due to the failure to observe the fundamental principle, that a British Act has, save where expressly extended beyond the limits of the United Kingdom, no extra-territorial effect.

Limitation of Liability under the Merchant Shipping Act.—There is, of course, more substance in the fact that the Dominion Parliaments have no very effective power, save perhaps as regards registered shipping and the coasting trade, to vary the limits of liability prescribed by the Imperial Act of 1894. The validity of the Canadian legislation (Revised Statutes, 1906, c. 113, s. 921) altering the limitation was not seriously contended for in *The Storstad*,[2] and clearly would not have been upheld as regards that case by the Privy Council if the matter had had to be dealt with. But the necessity of uniformity is obvious and any constitutional difficulty should disappear, if the international agreement on this subject recently achieved is adopted by the United Kingdom and then by the Dominions, as recommended by the Imperial Conference of 1926. Without international regulation the matter simply defies suitable regulation ; it is in no way satisfactory that in a case like *The Fagernes* [3] the issue should depend on the Court in which it is tried.

Dominion Powers of Taxation.—The extra-territorial issue is also presented in the case of *Pass* v. *British Tobacco Co.* (*Australia*) *Ltd.*,[4] which has a very real interest for British investors. The action resolved itself into a claim by a British company which held shares in the defendant company that it was not liable to have deducted from the dividend payable to it by the defendants the amount of Australian income tax to which the plaintiffs were assessed under the Commonwealth Income Tax Assessment Act, 1922. The defendant company was not a trading concern, but derived the whole of its income from four trading companies carrying on business exclusively in Australia. Its head office and Board of Directors were in Australia, but it had a register of shares in England and was incorporated there. The Australian legislation not only aimed at imposing income tax on profits derived from Australian concerns, but it authorized the making of the defendant company the agent of the plaintiff company for income-tax purposes and empowered it to

[1] [1923] Can. Exch. Rep. 208. [2] [1920] A.C. 397.

[3] [1926] P. 185. See *Journal of Comparative Legislation*, Third Series, vol. viii, pt. 4, pp. 290, 291.

[4] 42 T.L.R. 771.

deduct from the payment of dividends income tax on the amount of the dividends. Two questions clearly arose for decision in favour of the defendants if they were to be protected. In the first place, could it be held that the Commonwealth Parliament could impose a tax on persons domiciled and resident in England in respect of dividends payable by an English company? It is clear that the Commonwealth Parliament could only tax something within the territorial sphere of its operation, and the shares, upon which dividends were declared by the defendant company, were clearly situate in England, in accordance with the recent decision of the Privy Council itself in *Brassard* v. *Smith* [1] that shares are situate where they are registered and transferable. It followed, therefore, that the Commonwealth legislation purporting to tax dividends on the shares was *ultra vires*, and accordingly the deduction made by the company under the instructions of the Commonwealth authorities was invalid. But the same result was reached in a second way. It was held by the Court that the contract between the plaintiff and the defendant companies was an English contract, and that the proper law of the contract was English; this being so, the Court was bound by the doctrine of *Spiller* v. *Turner* [2] and *Indian and General Investment Trust, Limited* v. *Borax Consolidated, Limited* [3] to hold that a variation of the contract could not be effected by the Commonwealth Parliament. This doctrine, of course, is one of private international law, and it would apply equally to legislation in any foreign country. But it illustrates the real difficulty which must arise in any system of extra-territorial legislation if the Commonwealth or other Dominion desires to have authority to impose income tax on British subjects resident in the United Kingdom merely because they receive dividends from companies in England which themselves make profits in Australia.

The Governor and Ministers in New South Wales.—The mission to England to secure Imperial intervention to compel the Governor of New South Wales [4] to swamp the upper house, and to enable it to abolish itself, naturally failed, though the Premier drew from the discussions of his emissary with Mr. Amery the conclusion that the Governor ought to agree with ministers. It is incredible that Mr. Amery can have taken such a view. That a Government with a microscopic majority in the lower house should be enabled to secure the destruction of the upper house, without a popular mandate, after an addition of 25 members for this purpose had failed to bring about the result, would be a travesty of popular government. The Premier, however, pressed on a proposal to secure the Governor's recall, and appears to have had some reason to suppose that Mr. Amery would concede this. The argument seems to have been that the action of Lord Byng in Canada had proved unpopular, and, therefore, the Governor in New South Wales should not

[1] [1925] A.C. 371. [2] [1897] 1 Ch. 911. [3] [1920] 1 K.B. 539.
[4] *Journal of Comparative Legislation*, Third Series, vol. viii. pt. i, pp. 129 f.; pt. 4, p. 283.

be encouraged to oppose ministers. The contention was ridiculous. The Governor-General of Canada had declined, contrary to all Dominion precedent, to grant a dissolution to an undefeated ministry, and had granted one to a ministry whose constitutional existence had been correctly denied by the House of Commons; the Governor merely held that he had gone to the extreme of concession in regard to the destruction of a chamber of the legislature, and that he must have a popular mandate if he was to add yet further members in an effort to abolish the Council. Dissensions in his ministry, resulting in the resignation of three ministers, ended in an intimation of intention to have a dissolution in 1927, but fear of the result caused a reversal of the decision. It may be worth while pointing out that there is no cogency in the use made by the Premier in his official memorandum of November 24, 1925, and elsewhere of the views expressed by me in this *Journal*[1] regarding the propriety of applying to the Dominions the rule of strict ministerial responsibility as in the United Kingdom. On that subject I remain of the same opinion, and it has now been approved, on the motion of Mr. Mackenzie King, who adopted it as expressed by me,[2] by the Imperial Conference for the Governors-General and the Governor of Newfoundland. It has, however, not even now been applied to the States, Southern Rhodesia, or Malta, though even there it should, on sound principles, ultimately prevail in all matters of internal concern. But the principle is merely to assimilate the position of the Governor to that of the King, and it is really out of the question to presume that His Majesty could properly be asked, or, if asked, could consent to add Peers to the House of Lords, in order to secure the passage of a Bill to extinguish that House, on the advice of a Prime Minister possessing a trifling majority in the House of Commons and with no real mandate from the people. The Governor of New South Wales, in my view, went to dangerous lengths in his original concession of 25 members; to go further would have been unconstitutional, and for the Secretary of State for the Dominions to induce him to go further would prove a most awkward precedent in the event of an attack on the House of Lords. That the will of the people of New South Wales should prevail is obvious, but it should do so through the constitutional medium of an election, not through pressure on a Governor. Comparison with the abolition of the upper house in Queensland is wholly misleading. That house was abolished by a Bill passed on third reading in the Assembly by 46 to 17 votes—part of the opposition regarding a nominee house as worthless—and ineffectively fought even in the upper house, which had been swamped in 1920, not by a Governor, but by a political partisan[3] who, most improperly, had been chosen to represent the Crown as Lieutenant-Governor.

[1] *Journal of Comparative Legislation*, New Series, No. xxxix, pp. 227 ff.

[2] Speeches of July 1 in House of Commons, and July 23 at Ottawa.

[3] The facts in my letter in *The Times*, June 2, 1920, were not even questioned by the Premier of Queensland.

Colonial and Indian Divorces.—Despite heroic efforts on the part of Scottish members and the unanimous protests of the Faculty of Advocates, Writers to the Signet, and Solicitors to the Supreme Court,[1] the House of Commons consented to pass the measure to confer on Indian and, if desired, colonial—as opposed to Dominion—Courts, wide powers to divorce persons domiciled in England or Scotland in cases where hardship may result from refusing jurisdiction. The justification for the measure, so far as one existed, was that the power to divorce on the ground of residence was held by some Indian Courts to exist under the Act of 1869, and that the discovery that the practice was ineffective as regards the status of persons so divorced in places outside India demanded a remedy. The Government adhered to the refusal to allow the Indian Courts to be required to act on Scottish law as regards persons domiciled in Scotland, on the score that it would be beyond the power of Indian Courts to appreciate the doctrines of Scottish law. The decision must be regarded as very unfortunate; it would have been quite sufficient to provide that persons domiciled in Scotland might obtain divorces on the score of desertion, and that cross divorce suits should result, if the grounds were established, not in the dismissing of both cases as under English law, but in the grant of divorces to both parties. It is, however, thoroughly unsatisfactory that domicil should cease to be the sole basis of divorce jurisdiction, and it seems impossible permanently to rule that domicil shall be the general principle when so complete an exception is permitted. Hard cases make bad law.

British Nationality.—The Imperial Conference has fortunately not led to any effort to disturb seriously the rules laid down by the Acts of 1914–22. In special, on the vexed issue of the nationality of married women agreement was impossible, and very probably different courses may be taken in different parts of the Empire. But that cannot be done effectively until the present legislation is altered, because on any sound interpretation the rules laid down in the Imperial legislation bind the whole Empire and cannot be varied by any Dominion legislation—a fact not always adequately appreciated in the Dominions. The changes in the present Acts actually agreed on are essentially of minor importance, providing for a slight extension of facilities to secure that the new rule of the retention of British nationality by descent shall apply to children of the third generation born abroad between August 4, 1914, and August 4, 1922, and the removal of ambiguities in s. 12 of the Act of 1914, which deals with the loss of nationality by minors through its loss by a parent. More important is the suggestion that British subjects by naturalization, if resident abroad, should be required to register annually at a British Consulate, a rule which can be enforced by withdrawal of the certificate on failure for two years or more to register.

[1] See *Journal of Comparative Legislation*, Third Series, vol. viii, pt. 4, p. 288; *The Times*, May 3, 1926. The complete indifference to Scottish legal opinion of the House of Commons was significant.

It is also proposed to confer power to withdraw certificates from widows of deceased naturalized British subjects, and from children whose character as British subjects is due to the naturalization of a parent. It may be hoped in any case that the Dominions will consent to wait to ascertain whether there is any chance of international agreements being achieved under League auspices in order to avoid the multiplication of persons with dual or no nationality. The Conference also repeated the views expressed in 1923,[1] which include the important principle that, where British nationality can be obtained in a mandated territory, it should be given Imperial validity; the advantage of this would primarily lie in converting into full Imperial naturalization the change of nationality of German subjects in South-west Africa effected by the Union of South Africa legislation of 1924.

The Retirement of Judges.—The Commonwealth has now adopted a system of judicial pensions in recognition of the unwisdom of life-tenure without pension. The possibility of restricting life-tenure has been favourably considered by the Government, but it could only be achieved by a constitutional alteration, and, therefore, must stand over for inclusion in any constitutional changes which may be agreed on in 1927. It is recognized that occasionally judges do retain to a very advanced age remarkable powers, but it was held that the advantage derived in such cases was outweighed by the injury inflicted by the retention of high judicial office by men of impaired mental faculties. Fortunately there was no strong feeling in favour of the Labour policy of a time-limit without pension, which has been applied in Queensland without edifying results. An effort was made to accelerate retirement on the part of judges by providing that the pension normally payable should be reduced by a tenth for each year of office after reaching age 70. The House of Representatives actually carried the proposal by a majority of one, but the Government secured the deletion of the offending clause through the action of the Senate, and the proposer of the provision in the lower house recanted his views when the request of the Senate for amendment fell to be considered, much to the indignation of Labour members. As a matter of fact the amendment was badly worded, and would have operated *inter alia* to deprive any existing member of the High Court who was driven to retire on the ground of ill-health of any pension whatever, while none of the existing judges could have obtained a full pension, so that they would have had no motive to retire at all. In any case, clearly, to enforce retirement is a matter for a constitutional change, and the indirect method suggested would have doubtless been ineffective. It is, however, an interesting proof of the feeling that men will not retire voluntarily even when they clearly should that the Commonwealth took shortly before special care to fix a time-limit for tenure by the Controller and Auditor-General, whose tenure is not protected by the constitution.

[1] See *Parl. Pap.*, Cmd. 1988, pp. 143 ff.

NOTES.

The Vatican and Nullity of Marriage.—The protracted absence of the sea-serpent from our shores may have something to do with the outburst of controversy and comment in the press concerning the judgment of the Roman Catholic Diocesan Court, confirmed on appeal to Rome, annulling the marriage of the Duke of Marlborough to Miss Consuelo Vanderbilt.

Long before the case was reported it was described " as a shock to the public conscience " and as proving that " a divorce obtained in a secular Court may work infinitely less harm and cause less injustice," to cite only two out of many condemnations.

All this kind of thing is distinctly unedifying. It can seldom, if ever, be profitable to criticize the judgment of a Court before the case has been reported and in ignorance of the evidence adduced. And fair-minded people, to whatever school of thought they may belong, would like to see the same prominence given to the judgment, now that it has appeared, as was allowed to those who rushed in blindly to attack it.

If decrees of this kind pronounced by the Roman Catholic Courts produced civil effects in England, either as regards the parties or the children, they would be matters of public concern.

Seeing however that, so far as legal rights in England are concerned, the decree does not make an iota of difference it is surely a private affair. If two persons for the ease of their consciences desire to submit the question of the validity of their marriage to an ecclesiastical tribunal why should they not be allowed to do so in peace ?

At certain periods when the number of canonical impediments was much greater than now and when the decrees of the Church Courts *did* produce civil effects there is no doubt marriages were precarious enough.

In no country, perhaps, was this more true than in Scotland. Those who are curious in such matters may find a wealth of material, particularly for the sixteenth century, in Riddell's *Scottish Peerages and Consistorial Law*. Riddell explored for the first time the few volumes of old manuscript reports of the Courts of the Officials in Scotland, which have survived the destructions of the Reformation, and he gives hundreds of cases of nullity of marriage, many of them pronounced on the ground of impediments no longer recognized. But all this belongs to history.

The new revision of the canon law which appeared in 1919 under the title of *Codex Juris Canonici* has greatly reduced the number of impediments, and we believe that nowadays the number of decrees of nullity

pronounced by the Church Courts is relatively small. It is stated by one of the correspondents to *The Times* that the Supreme Court, the Roman Rota, deals, on an average, with not more than 20 cases a year, and that in a German diocese with a Roman Catholic population of 3,000,000, there were less than 70 decrees of nullity in a year.

With the statistics of our Divorce Courts staring us in the face it hardly seems fair for us to cast a stone.

But from the legal point of view the Marlborough suit is full of interest. The questions to be decided were two, viz. (1) Was there such *vis et metus* proved as excluded the free consent of Miss Vanderbilt? and (2) If so, had there been nevertheless such acquiescence or subsequent consent as to validate the marriage? And, although these matters did not have to be decided, a few words may be said on two other questions which arise, namely (3) What is the legal effect of *metus*? and (4) Does the annulment of the marriage affect the status of the children?

As regards the first point the Court seems to have found little difficulty. It is a question of the appreciation of evidence and of the application of the law as to *metus*, fixed by the practice of the Courts.

Metus is discussed by the canonists with much subtlety, and Sanchez, for example, devotes a whole book to it, *Metus reverentialis*, i.e. respect to the authority of a parent may be a ground for annulment when it is proved that the parent's authority was used to extort the consent, particularly if the child was in a special degree subject to the will of the parent. The evidence here satisfied the Courts that the mother of the young bride exercised such control over her as to induce her to give a consent which was not free.

The crux of the case was the question of *validatio*. The ostensible marriage had subsisted since 1895, though the parties had not always lived together. Two sons had been born. There had been a divorce in 1920, but this of course was not recognized by the Roman Catholic Courts. Did the cohabitation in all the circumstances lead to the conclusion that the Duchess, though coerced into the ceremony, had at a later date consented to marriage? Now, upon the matter of *validatio* or ratification the canon law, if we apprehend it correctly, differs considerably from the English law. In the Roman law *metus* made a contract voidable but not void—*coacta voluntas tamen voluntas est.* The English law is the same. But the canon law at a comparatively early period rejected this view in the case of marriage, holding that for marriage there must be not merely consent but *free* consent.[1] But if *metus* makes a marriage void *ab initio* how can there be any validation or confirmation of a nullity? *Quod nullum est nullum producit effectum.* The answer is that what is here styled, not very correctly, *validatio* is not a confirmation which validates the original ostensible marriage.

[1] See Freisen, J., *Geschichte des Canonischen Eherechts*, 275; Brouwer, H., *De Jure connubiorum*, 1, 17, 20 and 22; Pothier, *Traité du Contrat de Mariage*, n. 315; Schulte, J. F., *System dès allgemeinen Katholischen Kirchenrechts*, ss. 590, 608.

Validatio is the supervening free consent of both parties to a new marriage. When the Court is satisfied that there has been *validatio* the marriage dates, not from the ceremony, but from the subsequent interchange of free consent. And this matrimonial consent does not need to be manifested on the form prescribed for marriage by the Council of Trent, or by a declaration before witnesses, or in any other formal manner.[1]

Such free consent, however, presupposes a knowledge of the nullity. So long as the parties continue to believe that they are bound by the original tie there can be no change of *animus* from which *validatio* can be inferred. In this case the Courts held that, seeing that the Duchess was a Protestant, it was altogether unlikely that she knew anything about the canon law, or about the possibility of getting her marriage annulled by a Roman Catholic Court. They cite Paul—the jurist not the apostle—for the proposition that a woman is not always presumed to know the law (*Dig.* 22.6.9. pr.). Among Roman Catholics we suppose a knowledge of the law would be presumed. At any rate, at an earlier period there is a good deal of authority for the view that no challenge of a marriage on the ground of *metus* could be entertained after a considerable period of cohabitation, even if it was merely *diuturna habitatio spontanea absque copula*.[2] At one time it looked as if a year and a half was to be taken as a period after which the action would be too late.[3] It is we think correct to say that *vis et metus*, as interpreted by Courts of Canon Law, is a wider term than the duress of English law. Duress in matrimonial causes in England is extremely difficult to establish and there is, we believe, with the possible exception of *Harford* v. *Morris*,[4] no reported case in which a marriage which had been consummated has been annulled on this ground.

But in *Harford* v. *Morris* the evidence of duress was particularly strong. A guardian had carried off his ward to the Continent and gone through a ceremony of marriage with her. In the Court of Arches Sir George Hay, notwithstanding, rejected the libel. He objected to the ward being described as a "child" and she had, in fact, attained the ripe age of twelve and a half years, which was, of course, above the age of consent. But, on appeal, the High Court of Delegates held that the marriage was "null and invalid" on the ground of duress, the Court being, no doubt, much influenced by the youth of the girl and by the relationship of guardian and ward between the parties.

Whether a marriage entered into under duress is in the English law void *ab initio* or only voidable, has long been considered a doubtful

[1] See Freisen, *op. cit.*, 275, 304; Schulte, *System des allgemeinen Katholischen Kirchenrechts*, 2, 638.

[2] Sanchez, 4.18.4.

[3] Decretal, 4.1.21, and the thirteenth-century writers cited by Freisen, 265, *Cf.* Decretal, 4.1.28.

[4] 1776, 2 Hagg. Con. 423.

point. But the tradition of the canon law and the greater weight of authority are in favour of the view that it is void.[1]

The fullest statement of the law is in Ayliffe's *Parergon* (ed. 1726, p. 361): "Matrimony ought to be contracted with the utmost freedom and liberty of consent imaginable without fear of any person whatsoever. For matrimony contracted through any menace or impression of fear is null and void *ipso jure*, so that it is not necessary to rescind the same by an action in the civil and canon law called *Quod metus causa*, because all marriages ought to be free. For marriages contracted against the will of either of the parties are usually attended with very bad and dismal consequences. . . . But though matrimony contracted through such a fear as may happen to a man of courage, constancy and resolution be null and void *ipso jure*, yet this fear may be purged and done away by a spontaneous cohabitation for so long a time as that the cause of such fear may be presumed to cease and be destroyed thereby, and a spontaneous consent added in its room."[2]

On the point of confirmation or validation old writers cite, quaintly enough, the rape of the Sabine women where the unions acquired validity "by length of time and the yielding and forgiving temper of the sex."[3]

But the result is the same whether we say that the marriage was voidable but has become good by acquiescence, or that it was void, but the party is estopped by his conduct from setting up the nullity.

Modern continental codes prescribe a fixed period after which the marriage is unchallengeable. By the German and Swiss Codes the period is six months after the cessation of the duress (B.G.B., 1339; *Code Civ. Suisse*, Art. 127). And by the French Code (Art. 181), the challenge cannot be brought if there has been six months' continuous cohabitation after the party regained complete freedom of action.

The German *Reichsgericht* has held that when the party to a voidable marriage in knowledge of the *fact* which gives him a right of challenge, continues the cohabitation, he cannot thereafter attack the marriage on the ground that he was ignorant of the law (R.G. 12 Nov. 1908; R.G.Z. 69, 410).

This was the situation in the Marlborough case where the application of the canon law led to an opposite conclusion.

Some of the letter writers maintain that the English ecclesiastical Courts have in several cases annulled marriage on the ground of duress after long cohabitation and the birth of children. But the cases which they cite are quite irrelevant. They are decisions under Lord Hardwicke's

[1] In this sense, 1 Roll. Abr. 340.5.20; Vin. Abr. Baron et Feme (A.) pl. 5; Ayliffe, *Parergon*, 361; Shelford, *Marriage and Divorce*, (1841) 213; Poynter, Thomas, *Marriage and Divorce*, (1824) 139. *Contra*, Com. Dig. Baron et Feme (B. 6); Eversley, *Domestic Relations*, 4th ed. p. 30. Dyer gives some old opinions both ways (1 Dyer, 13 a).

[2] Ayliffe's *Parergon* is described as "of high authority" by Tindal C.J., delivering the opinion of the Court of Exchequer Chamber in *Veley* v. *Burder*, 1841, 12 A. and E. 302.

[3] Cited by Poynter, *loc. cit.*

Act (fortunately no longer in force), making the marriage of minors null and void if celebrated without the consent of parents or guardians. The judgment in such cases was purely declaratory, and the Court had no discretion. And, obviously, the continued consent of the parties to the marriage could not get over the want of consent of the parent.[1] No purpose has been served by dragging these cases from their obscurity.

The remaining point to be noticed is the effect of annulment upon the status of children.

In the English law the children of a marriage which has been annulled are illegitimate. In the case of Sir Ralph Sadleir in 1547 a special Act of Parliament was passed to declare his children born of such a union to be legitimate. This is, we believe, the only case of the kind except that of the children of John of Gaunt.[2]

The legitimacy of the Lady Margaret Douglas who was the child of an annulled marriage was by comity recognized in England, and through her James I took the honours and estates of Angus. But this creates no difficulty.[3] In principle the English law sternly refuses to admit the legitimacy of the children of an annulled marriage.

In this respect the advantage is all with the canon law, Since the beginning of the twelfth century it has held that where there is a putative marriage, *i.e.* where both of the parties to a ceremonial marriage or even one of them is unaware of the invalidity, the children are legitimate,[4]

The canon law on this point has been adopted by most continental systems, as well as by the law of Scotland.[5]

The Swiss Code goes further and makes the children legitimate, whether the parties to the marriage which is annulled were in good faith or not.[6] And, we believe, the new draft code for Czecho-Slovakia follows this.[7] This may be difficult to justify. But the theory that the children of a ceremonial marriage, which one at least of the parties believed to be valid, should be legitimate is entirely reasonable.

English law has been extremely harsh in refusing for so long a time to admit that children born out of wedlock are legitimated by the subsequent marriage of their parents.

[1] *Johnstone* v. *Parker*, 1819, 3 Phillimore, 39 ; *Hayes* v. *Watt*, 1819, 3 Phillimore, 43 ; *Duins* v. *Donnovan*, 1830, 3 Hagg. Eccl. 30.

[2] Nicholas, Sir N. H., *Adulterine Bastardy*, p. 61.

[3] Riddell, *op. cit.*, p. 453.

[4] Decretal, 4.17.1 ; 17, 34 ; Hertius, J. N. *de Matrimonio putativo* ; Freisen, *op. cit.*, 858; Schulte, *System*, 2, 645. *Cf.* the rescript of Pope Alexander III (1159.81) to the Bishop of Exeter which begins with the memorable words, *Tanta est vis matrimonii, ut qui antea sunt geniti post contractum matrimonium legitimi habeantur* (Decretal, 4.17.6).

[5] C. C. Fr. Art. 201 ; Aubry et Rau, 5th ed. v. 7, s. 460 ; *Cass*, 5 *janvier* 1910, *Dalloz*, 1911.1.338 ; *Cass.* 5 *novembre* 1913, *Dalloz*, 1914.1.281 ; B.G.B. 1699 ; Fraser, P., *Parent and Child*, 3rd ed. 27.

[6] *Code Civil Suisse*, Art. 133.

[7] See Koessler, *Die Dispensehe in Oesterreich, in Zeitschrift für Vergleichende Rechtswissenschaft*, 1926, vol. 42, p. 26.

After January 1, 1927, however, such children will be legitimate in England as they are in most European countries.[1]

Upon what grounds can it be argued that children born to parents who knew that their intercourse was illicit should become legitimate, while the stigma of illegitimacy should rest on the children of a union duly solemnized and believed by one consort if not by both to be valid? As Lord Fraser says: "Where no offence against the laws is intended by one or both of the parties it would be inexpedient and cruel to extend the punishment of bastardy to the issue."[2]

F. P. W.

Juvenile Courts in Canada.—Under the auspices of the Canadian Council on Child Welfare Judge Helen MacGill has published an informing pamphlet on the underlying principles governing legislation in and practice of the Juvenile Courts in Canada. It may be doubted, however, whether there would be general acceptance of her proposition that such Courts "are in reality a remarkable development and outgrowth of the old great Chancery Courts of England." Moreover, it would appear that the Judge in dealing with the history of the subject did not have access to the *Journal* (see vol. vii, p. 375 *et seq.*) nor to Miss Spence's admirable brochure on State Children in Australia, where it is clearly shown that the first Children's Court within the Empire was established in South Australia in 1890. Judge MacGill's statement of the principles of Juvenile Court practice deserves attention, and it is of importance to note that she considers the services of a psychologist for making the mental tests and of a psycho-analyst for correcting mental twists to be essential to their sound working. In considering the work of the Courts the Judge directs attention to the difficulty of the work among girls and women. Minor crimes, often committed in ignorance, are much more serious in their result for the girl than for the boy. The pathetic examples which she gives from her own experience can leave no doubt on that point. The pamphlet is one which well deserves attention in other parts of the Empire.

Dismissal of Women Teachers.—*Short* v. *Poole Corporation*,[3] in which the Court of Appeal reversed the judgment of Romer J., will be a leading case on the power of the Courts to interfere with the exercise of a discretion vested in a public authority. The fact that we have in England no separate hierarchy of administrative Courts causes our administrative law to be less studied abroad than would otherwise be the case. But it is interesting to notice that the opinion of the Master of the Rolls in *Short* v. *Poole Corporation* is translated in full and the judgment of the Court of Appeal acutely discussed by Dr. Magdalene Schoch of Hamburg in a German periodical of administrative law.[4]

[1] Legitimacy Act, 1926.
[2] *Parent and Child*, 3rd ed. 27.
[3] 42 *The Times* Law Reports 107 (1926).
[4] Verwaltungsarchiv, 31 (1926), 469.

A school authority decides in principle to dismiss its women teachers who are married but to make exceptions in cases where the application of the rule would cause undue hardship. Can such a decision be set aside by the Courts? No bad faith or corrupt motive being alleged, the only remaining ground of challenge is that the act was *ultra vires*. It might be so considered if in arriving at their decision the public authority took into account matters "not proper for the guidance of their discretion," in the phrase of Lord Esher M.R.,[1] or, as the rule was expressed by Eve J., exercised "an educational discretion for an alien or irrelevant purpose."[2] It is clear that in the discussions of a council many things may be said which are not strictly relevant, and arguments may be urged which are political or social rather than educational.

If the courts were to take a narrow view, almost any decision of a public body might be upset on the ground that it was in part based upon alien considerations. But English Courts, as we all know, look at such cases in a broad way and are extremely reluctant to interfere with the exercise of discretion.

In *Short's* case much stress was laid on evidence that the school authority made inquiries as to the pecuniary circumstances of the husbands of teachers, with the idea of keeping those teachers whose husbands could not support them adequately. It was argued that these considerations were not educational. On the contrary, from the educational standpoint the richer the husband the less likely it was that the wife would be distracted by household cares from attending to her work as a teacher. A sufficient answer was to admit all this. In these exceptional cases the school authority quite frankly took into account alien considerations. They were prepared to sacrifice efficiency to some extent rather than cause great hardship to certain teachers. It did not follow that the general rule to dismiss the married women was based on other than educational grounds.

The German critic, writing from a feminist standpoint, disapproves of the result and says that a German Court would have come to a contrary decision. But this, as we understand her argument, is because the *Reichsgericht* interprets art. 128 of the German Constitution as making equal treatment of the sexes a constitutional principle binding on all public bodies.

Apart from this, the theory of continental administrative law in such matters closely resembles our own, though the modern French expression *détournement de pouvoir*, which German law has borrowed, is more elegant than *ultra vires*. It means, shortly put, that an act done by a public authority for a purpose other than that for which power is entrusted to it may be set aside. This is in fact the "alien or irrelevant purpose" of Eve J.

But though the theory is much the same, it may well be the case that

[1] *Reg.* v. *Vestry of St. Pancras*, [1890] 24 Q.B.D. 371, 375.
[2] *Price* v. *Rhonddha Urban District Council*, [1923] 2 Ch. 372.

in practice continental Courts are more ready to interfere. If so, it may be doubted if this is in the interest of good local government. If local authorities feel that they are in leading-strings, their sense of responsibility is weakened. The best policy seems to be that which English Courts adopt of interfering as little as possible. If the local authorities make mistakes it is the business of their constituents to turn them out of office at the next election if they think fit to do so.

F. P. WALTON.

A Reply: Backward Territories in International Law.—In his review of my *The Acquisition and Government of Backward Territory in International Law*,[1] Professor Berriedale Keith expresses disagreement with the views I have put forward on two questions.

In the first place, he says that:

> it is impossible to treat the recognition of the Monroe doctrine in the Covenant of the League as leaving it open for the United Kingdom to maintain the position of Lord Salisbury in 1895 in the Venezuela dispute, apart altogether from the fact that International Law rests on action as well as on words, and that the British surrender on the Venezuelan issue left Lord Salisbury's denials of the acceptance of the Monroe doctrine somewhat in the position of mere words.

To deal with the latter point first, it will be recalled that Lord Salisbury did not deny all force to the Monroe Doctrine. On the contrary, he admitted that it "must always be mentioned with respect, on account of the distinguished statesman to whom it is due, and the great nation who have generally adopted it," and he stated that Her Majesty's Government fully concurred with the view of President Monroe as to the inexpediency of any disturbance of the existing territorial distribution in America by fresh acquisitions on the part of any European State. What his lordship disputed was that the Doctrine was clothed with the sanction attaching to a rule of International Law. Such a position can surely not be considered to have been undermined when Lord Salisbury finally agreed to refer the long-standing boundary dispute to arbitration, notwithstanding that he did not object to the United States acting "as the friend of Venezuela" in the arbitration.

As regards Art. 21 of the Covenant of the League of Nations, the opinion I expressed was that "Although this Article in terms purports merely to leave the validity of the Doctrine where it was, it does appear to imply some recognition of that validity by the Members of the League." But even that cautious view goes farther in the direction which the reviewer appears to consider the right one than even some American authorities. Thus Dr. Charlemagne Tower, a former Ambassador of the United States, writing in the *American Journal of International Law* in 1920, after pointing out that European jurists are almost unanimous in declaring that the Doctrine is untenable and not binding by the

[1] See *Journal of Comparative Legislation*, Third Series, vol. viii, pt. iv, p. 307.

accepted rules of law, refers to Art. 21 in the following terms (p. 24):

> Nor have the European Governments formally recognized their obligation under the Monroe Doctrine, or our right to enforce it. For, even in the present Versailles Treaty of Peace with Germany, the most that they have been willing to concede has been to refer to it as a "regional understanding." Art. 21 of the League of Nations provides that: "Nothing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe Doctrine." A statement so non-committal that it is difficult to ascertain what meaning it may have at all in relation to the Monroe Doctrine; since its validity is not in the least defined by it, nor does it set forth who, if any, of the contracting parties is bound by the principles of the so-called "regional understanding," or who is a party to it.
>
> If they refused to recognize its validity, and the engagement into which they enter now provides that the Covenant shall not affect that validity, then, evidently, they remain where they were before, and are in no wise further bound.

And in 1923 the then United States Secretary of State (Mr. Hughes), in his addresses before the American Bar Association and on the occasion of the celebration of the centenary of the enunciation of the Doctrine, took up a position which, in its essentials, it is not easy to distinguish from Lord Salisbury's. Mr. Hughes expressly stated that the Doctrine is not a part of International Law, and treated it as "a policy of the United States maintained for its own security," as a declaration that certain action on the part of non-American Powers will be regarded as dangerous to the peace and safety of the United States and as "the manifestation of an unfriendly disposition." [1]

Then Professor Berriedale Keith sees difficulty in "the doctrine that International Law cannot recognize the position of a British subject exercising independent sovereignty," and he cites *Duke of Brunswick* v. *King of Hanover*. That case decided that English Law, when it had to determine whether the King of Hanover, who had remained a British subject, was liable to be sued in an English Court, could distinguish between acts done by the King of Hanover as such and acts done by him as a British subject. It is surely "a confusion between municipal and International Law" to appeal to that case when the question under consideration is whether International Law, looking at the problem from its own standpoint of inter-State relations, can recognize the right of a national of this or any other country to acquire sovereignty over backward territory for his own benefit.

It will not be disputed that no difficulty arises where the Crown lays claim to any sovereignty that has been acquired over backward territory by a British subject. Here International Law takes account of our well-established doctrine that any such acquisition is made on behalf of the Crown.[2] The cases which are considered to present difficulty are no

[1] Alvarez, *The Monroe Doctrine* at pp. 418 and 444.

[2] *See, e.g.*, Westlake: *International Law*, vol. i, ch. x (2nd ed., pp. 213 and 4).

doubt those in which the Crown has not seen fit to accept or assume sovereignty that has been acquired by a subject. I have given reasons in my Chapter XI for the view that the rule which the reviewer criticizes is applicable to these cases, and shall not be expected to repeat those reasons here. It is, however, pertinent to point out that the reviewer's reading of the judgments in *Duke of Brunswick* v. *King of Hanover* would not seem to have been one that was accepted at the time, even from the standpoint of Constitutional Law. The British Government evidently had no such clear idea of the legal position when in 1854 they caused two Commissioners to be appointed to inquire *inter alia* whether the position of Sir James Brooke at Sarawak, either as holding that possession of the Sultan of Borneo or, as he alleged, as an independent Rajah, was compatible with (among other things) his character of a British subject; and one of those Commissioners, the Hon. H. B. Devereux, expressly reported that if Sarawak was really independent it was possible that the duties attaching to a British subject must regulate Sir James's position as ruler, but that, in the face of the Act of 1813 (53 Geo. III, c. 155), which declared "the undoubted sovereignty of the Crown over the territorial acquisitions of the East India Company," he was not inclined to uphold the opinion that Sir James Brooke, or any other British subject, could attain to the position of being an independent ruler of a foreign territory.[1]

Again, if it had been considered in 1881 that, either by International Law or Constitutional Law, sovereignty over backward territory might be held by a British subject for his own benefit, the principle would certainly have been called in aid by Mr. Gladstone's Government when, in their controversies with Spain and Holland and in Parliament, they were so hard put to it to reconcile the non-assumption by Her Majesty's Government of sovereignty in North Borneo with the very full sovereign rights that had been obtained from the Sultans of Brunei and Sulu by Dent and his associates and were proposed to be exercised by the British North Borneo Company.[2]

One other word. My book is a treatise in Public International Law and is concerned only with relatively backward countries. The problems of Private International Law, and detailed discussion of many of the questions arising out of the succession of one advanced State to another, such as is to be found, for example, in the reviewer's *Theory of State Succession*, lie outside its scope.

M. F. LINDLEY.

[1] Parliamentary Paper: Borneo (1855).
[2] *Backward Territory*, pp. 100 and 106–8.

NOTICES OF BOOKS.

INTERNATIONAL LAW.[1]

THE multiplication of treatises on international law proceeds apace, but Oppenheim's magistral work continues to hold its primacy. From the point of view of its comprehensiveness, its methodical arrangement, the excellence of its bibliographical apparatus and the erudition of its authorship there is no other contemporary treatise, except perhaps that of the late Paul Fauchille, which will stand comparison with it, and since the latter work is in French its usefulness to English and American students is limited.

Oppenheim's treatise has from the first had an advantage over most of its competitors because, thanks to its enterprising publishers, it has been kept up to date through successive revisions, which in these days, when international law is continually developing and changing, is a necessity. First published in 1906, it was revised by its distinguished author in 1912, again by his faithful student, Mr. Ronald F. Roxburgh, in 1921, and now the fourth edition of the second volume, by Professor McNair, has made its appearance, which, it is understood, will be followed in due course by a new edition of vol. i. prepared by the same editor.

Professor McNair has followed the example of Mr. Roxburgh and instead of indicating by means of brackets the new matter added, has woven it into the text without the usual indicia to show what he has himself introduced. This method has the advantage of avoiding the disfigurement of the text by brackets or other signs, but it has the demerit of confusing inquisitive readers who may want to know whether particular opinions expressed are the editor's or the author's. In such cases the actual authorship can only be determined by a comparison of the author's edition of 1912 with that of the edition at hand. Opinions, however, will differ as to whether the preponderance of advantage lies with the one method or the other. In any case, the matter is of no great importance.

The title of vol. ii. in the present edition has been changed from *War and Neutrality* to *Disputes, War and Neutrality*, and for good reason,

[1] *International Law: A Treatise.* By L. Oppenheim, M.S., LL.D., formerly Whewell Professor of International Law in the University of Cambridge. Vol. ii., *Disputes, War and Neutrality.* Fourth edition. Edited by Arnold D. McNair, C.B.E., LL.D., of Gray's Inn, Barrister-at-Law, Fellow and Lecturer in International Law at the London School of Economics and Political Science in the University of London. (Longmans, Green & Co., Ltd., London, 1926. Pp. lv. + 752.)

considering that much of the new matter as well as some of the old deals neither with war nor neutrality but with the methods and processes for the settlement of international disputes. The new volume contains seventy-two pages of new matter, two of which represent additions to the list of books and documents quoted; eight, additions to the list of cases cited; and the rest, to the text proper and the footnotes. The new matter relates in major part to the Permanent Court of International Justice, the League of Nations, methods of settling disputes and reduction of armaments, although new sections dealing with a variety of other matters have been added throughout the book. A comparison of the present edition with the former one shows that many new footnotes have been added and old ones extended and brought up to date. There has been also a considerable addition to the bibliographical lists which usually precede each section, as well as to the lists of authorities and sources cited in the footnotes. The editor's service in this connexion constitutes one of the most important parts of his contribution to the revised edition and it is certain that it is what Oppenheim would have wished him to do, for he attached great importance to the value of bibliographical aids. Professor McNair's footnotes bear evidence of research and familiarity with the recent extensive literature, periodical and otherwise, dealing with international law. The publishers were fortunate in finding so careful and competent a scholar to undertake the task of editing and bringing up to date this indispensable treatise and students of international law everywhere owe him a debt for the conscientious and painstaking manner in which he has performed it.

JAMES W. GARNER.

THE WORKING OF THE LEAGUE NATIONS.[1]

THIS is a truly delightful little book on which Professor Baker deserves the warmest congratulations. Many propagandist volumes have been written on the League of Nations, but none with the same engaging qualities.

Professor Baker was himself an eye-witness of the framing of the Covenant and almost a participant. He was for some time a member of the Secretariat and has watched all the Assemblies from the beginning until now. These experiences have enabled him to impart to his pages both lucidity and life and have given him a remarkable power of exhibiting the wood through the trees.

The work cannot be regarded as a manual of international law. It does not cite a single authority or give a single reference. Instead, it starts every chapter—or almost every chapter—with an anecdote. Nevertheless it gives one an acute realization of the revolution which the League has effected in international law and international procedure, and the working of the League has never been more vividly presented

[1] *The League of Nations at Work.* By Philip Noel Baker, M.A. (Nisbet & Co., pp. xvi + 135. 3*s.* 6*d.* net.)

to the eye than in Professor Baker's three diagrams showing the organization of the Assembly, the Secretariat, and the Council with its dependent bodies.

In short it is a little book to which both those who know nothing and those who know much may turn with profit. It is calculated at once to inspire the novice and to refresh the adept. Perhaps its best quality is the easy and confident sense of proportion with which in a narrow compass it presents a picture of the whole.

If the volume has a fault, it is that its enthusiasm for the record of the League is perhaps just a little too whole-hearted. One would never gather from its pages that the conclusion of the Corfu incident—though the League was not responsible for it—was in fact a humiliation for the League. Nor would one gather that there was anything to be said against the decision of the Council on the question of Upper Silesia. And there is another point. This would be an ideal text-book for schools but for one circumstance. The chapter on Mandates opens with two distressing stories of the beating to death of a servant by his master, and of the robbery of their lands from a tribe of natives. Professor Baker no doubt has chapter and verse for what he says, but these things are calculated to excite controversy, if they seem to be presented as typical of British Colonial administration. One hardly likes to suggest to the austere virtue of Professor Baker that in his next edition—which will contain of course an account of the reception of Germany—the book would be made more useful as a school-manual by a change of anecdotes.

An excellent feature of the little book is its illustrations—and nowadays we realize that illustrations have their educational value—a group of the framers of the Covenant, a picture of the Assembly at work, a view of the Secretariat and a photograph of Dr. Nansen, the noblest figure in the history of the League—illustrations that must revive happy memories among those who have been present at Geneva and excite anticipations among those whose visits are still to come.

ANTON BERTRAM.

THE FIRST-FRUITS OF THE HAGUE ACADEMY OF INTERNATIONAL LAW.

IT is unnecessary to introduce to readers of this *Journal* The Hague Academy of International Law. Its reputation is well known in Great Britain both through the Press and, more important, through the reports of our colleagues and pupils who take part in its work. In addition, most of us are familiar with the very lucid and informative account of the Academy which its energetic secretary, Mr. E. N. Van Kleffens, published in the *British Year Book of International Law* of 1925.

But it is not of the instruction provided by the Academy, and the informal and valuable contact between teacher and taught which results, that I am now asked to write. The Academy has made, since it opened its doors in 1923, a solid—a very solid—contribution to the literature

of the law in the form of the five volumes [1] which now confront me. representing the lectures delivered during the sessions of 1923 and 1924, or, to be more precise, those courses of lectures which have not already been published elsewhere.

It is well recognized that abroad the term "International Law" has a much wider meaning than with us, and a perusal of these volumes affords striking evidence of this fact. For instance, many of us in this country are unwilling to grant a place to the so-called "Private International Law," or better called "Conflict of Laws," within the domain of International Law.[2] Among the courses upon topics of Private International Law given at The Hague may be mentioned those of Professor Antoine Pillet on *La Théorie continentale des conflits des lois*, of Dr. H. H. L. Bellot on *La Théorie anglo-saxonne des conflits des lois*, much of Professor Niemeyer's *Les Sociétés de commerce*, of M. Maurice Travers, *Les Effets internationaux des jugements répressifs*, and of M. E. Isay's *La Nationalité*.

International financial relations have become of increasing importance in post-war Europe, and so we are not surprised to find courses by M. A. Andréades on *Les Contrôles financiers internationaux* and by Sir John Fischer Williams, K.C., on *L'Entr'aide financière internationale* and *Le Droit international et les obligations financières internationales qui naissent d'un contrat.*

In addition to these border-line topics, if I may so describe them from an insular point of view and without minimizing their great importance, the "legitimate drama" is strongly represented in these volumes, historically, philosophically and in the realm of positive law. In the first category, where a great deal of work remains to be done in spite of the works of Wheaton, Nys and T. A. Walker, we find the late Baron Korff's *Introduction à l'histoire du droit international* (and it is much to be regretted that his early death in 1923 has prevented the publication of the remainder of his course); Professor O. Nippold's *Le Développement historique du droit international depuis le Congrès de Vienne*; and M. Simon Planas-Suarez' *L'Extension de la doctrine de Monroe en Amérique du Sud.* Certain basic problems of international society and of its law are examined by Lord Phillimore in his course on *Droits et devoirs fondamentaux des états*, by Professor Jesse S. Reeves in *La Structure de la communauté internationale*, and by Professor Heinrich Triepel in *Les Rapports entre le droit interne et le droit international.*

Your reviewer must frankly admit that he has not yet read all the contents of these five volumes, and cannot attempt a critical estimate of each of the many contributions. There are, however, one or two courses, chosen by caprice, of which more than mere individual mention may

[1] Académie de droit international: Recueil des cours: 1923 and 1924 (tomes i–v). (Librairie Hachette, Paris.)

[2] As to the true content of "Private International Law," an article by Mr. W. E. Beckett in *The British Yea Book of International Law* for 1926 should be consulted.

be made. M. Scipione Gemma, Professor at the University of Bologna, has contributed a course upon *Les Gouvernements de fait*, a matter of unusual importance during the past ten years. With great learning he discusses the position of these governments and the process of their legitimation, from the point of view of constitutional law, of international law and of private law. There has been much speculation of late on the questions whether recognition of a government *de facto* differs in legal effect from recognition *de jure*, and, if so, what that difference is; whether, as Professor Gemma puts it, *leur variété est dans leur nature, ou seulement dans leur gradation?* He comes to the conclusion that the latter is the case, and for legal purposes we think that this view will receive general assent. Sir Frederick Pollock, in a letter published in the London *Times* on February 5, 1924, addressed himself to the question and wrote: "It is rather hard to see what the recognition of a new Government as *de jure* adds to recognition as *de facto*, unless it be the judgment of the recognizing Power that no adverse claim remains outstanding, or none which need be seriously regarded for any practical purpose"; in fact, the distinction is political rather than legal. That the English Court of Appeal is of this opinion is tolerably clear from the judgments in *A. M. Luther* v. *Sagor & Co.* [1921] 3 K.B. 532, as Professor Gemma points out. His assembling of material relating to the recognition of new Governments and the formation of new States, and his numerous references to the existing literature, combine to make this course of lectures a substantial enrichment of the available knowledge of a very difficult topic. (Some British readers will hesitate to assent to his description of the so-called Anglo-Irish treaty of December 6, 1921, as *un acte international* whereby *une situation constitutionnelle est imposée*).

Another topic well represented is Diplomacy and the Diplomat. Mr. R. E. L. Vaughan Williams, K.C., member of the Anglo-German Mixed Tribunal, contributes a course on *Les Méthodes de travail de la diplomatie*, in which, after tracing the rise and development of diplomacy in classical and mediæval times, he describes with great charm the more personal and practical aspects of the diplomatic career, illustrating out of his wide reading the different aims which in different eras it has been a diplomat's duty to pursue, and the qualities which he should possess. Particularly valuable is a brief vocabulary of the terms in commonest use in diplomacy. Again, Professor Charles Dupuis in his course on *Les Relations internationales* has a great deal to say upon diplomatic agents and the making of treaties, together with the Responsibility of States and Intervention. Another part of his course is devoted to a study of International Sanctions. Professor Strisower in his course on *L'Exterritorialité et ses principales applications* devotes twenty-five pages to the legal position of the diplomatic agent and of his family and suite, and also deals with Heads of States, and foreign troops and public ships.

Professor André Weiss, Vice-President of the Permanent Court of

Justice, also examines the doctrine of Exterritoriality in his course on *États étrangers devant les tribunaux*. Territorial Waters and the Open Sea are dealt with in two courses, in Professor George Grafton Wilson's upon *Les Eaux adjacentes au territoire des états*, which includes a section on the recent American problems arising out of the Prohibition Amendment; and in the course by Professor Charles Dupuis entitled *Liberté des voies de communications*, which contains an examination of the law affecting the Open Sea, the Maritime Belt, Straits, Canals, International Rivers, Railways and the Air viewed from the point of view of liberty of transit through these different *media*. Professor Maurice Bourquin's course on *L'Organisation internationale des voies de communication* deals with many of the same problems from the standpoint of treaties.

The important group of topics which one associates with Geneva and the influence of the League is represented by M. André Mandelstam on *La Protection des minorités*, M. Francisco Léon de La Barra on *La Médiation et la conciliation internationale*, Professor Eugène Borel on *L'Organisation internationale de la Croix-Rouge*, Professor Ernest Mahaim on *L'Organisation permanente du travail*, and Professor Giulio Diena on *Les Mandats internationaux*. An unusual topic to be handled by an internatonal lawyer is *Questions de droit international concernant les religions*, and it is surprising how much of importance Professor Hobza finds to say in his very interesting course on this topic, much of it naturally being connected with the protection of minorities.

There are also courses by M. le Baron Albéric Rolin upon *Extradition*, by Professor Wilhelm Kaufmann on *Les Unions internationales de nature économique*, and by M. le Baron Boris Nolde on *Treaties of Commerce*.

It is impossible to do justice to the contents of these volumes within the limits of a review. They form a contribution to the literature of the law of high importance and place lawyers under a large debt of gratitude to the lecturers who delivered them, to the members of the Curatorium of the Academy and their staff who planned and published them, and (once more) to the Carnegie Endowment for International Peace.

ARNOLD D. MCNAIR.

INTERNATIONAL AND INTER-RELIGIOUS PRIVATE LAW IN PALESTINE.[1]

THIS book is addressed primarily to students and lawyers in Palestine, and will be of great service to them. But it is by no means without interest elsewhere. Mr. Goadby says he believes it is the first legal work printed in English in Jerusalem, and if so the printer deserves great credit, though misprints are fairly numerous.

Its main function is to explain the rules as to jurisdiction, and as

[1] By F. M. Goadby, M.A., B.C.L. (Oxon), Director of Legal Studies to the Government of Palestine. ("Hamadpis" Press, Jerusalem, 1926. Pp. 305.)

to the law to be applied in questions of personal status to the various categories of persons who make up the population of Palestine.

Only those who have lived in the Orient can appreciate the complexity of the legal system.

Conflicts of laws in a country like England arise only when there is a question whether the territorial law or some foreign law is to be applied, and such questions are relatively rare.

But in Egypt or Palestine conflicts of laws occur daily in suits between persons both domiciled within the territory and subject for certain purposes to the territorial law. To a large extent people live under a system of personal laws similar to that of Western Europe from the sixth till about the tenth century, when it was said, " It often happens that of five men who chance to be sitting together, every one is under a different system of law." The Palestine Order in Council of 1922 preserves, broadly speaking, the immemorial tradition of the East that the law of personal status is left to the Religious Courts, Moslem, Christian and Jewish. And as there are at least eight separate Christian communities, each with its own Court, and more or less its own law, possibilities of conflict are not likely to be wanting. Mr. Goadby tells us something about the Religious Courts, but we should like to know more as to the reputation they enjoy, what sort of records they keep, what books of authority they rely upon, how far they consider themselves bound by previous decisions and so forth.

It is interesting to observe that some of them have adopted a good deal of Moslem law as to matters concerning which their own laws are silent or have fallen into desuetude.

Particularly difficult questions occur when one of the parties to a marriage changes his or her religion, sometimes, it may be feared, in order to get a divorce. Upon this, as upon many other matters, Mr. Goadby has much that is interesting to say. His long experience of the law both in Egypt and Palestine gives him peculiar qualifications for writing a book of this kind.

It is noteworthy that the Palestine Order in Council settles the tiresome question of the *renvoi* by directing the Civil Courts to " accept " the *renvoi*, i.e. if the national law of a person concerned says that the matter is to be governed by the law of the domicile the Courts are to apply this law. The Order in Council also directs the Civil Courts to exercise their jurisdiction in conformity with the Ottoman law in force on November 1, 1914, and the Ordinances, etc., of the Government of Palestine. When neither of these apply they are directed to make use of the Common Law and doctrines of Equity in force in England " so far as the circumstances of Palestine admit " (p. 119). A good deal will depend on the extent to which this power is exercised.

F. P. W.

CONTRACTS IN MEDIÆVAL ENGLAND.[1]

Dr. R. L. Henry, Judge in the Mixed Courts at Alexandria and formerly Professor of Law at the Universities of Louisiana, Illinois, North Dakota and Iowa, has made an important study of contracts in English local courts in the Middle Ages. For this purpose there is not much material till the twelfth century begins to furnish those records which Maitland and his fellow-workers made available in the volumes of the Selden Society. For the seignoral courts there is the *Court Baron* and also the *Select Pleas in Manorial and other Seignoral Courts*; for the municipal court practice there is the *Borough Customs*; for the law of markets and fairs the *Select Cases Concerning the Law Merchant*; and for the county court the *Eyre of Kent* of the year 1313–14. The last-named volume speaks of course of royal as well as local justice, a distinction of substance in matters of contract. Glanvill in his tenth book writes that there are agreements which royal courts do not enforce (*privatas conventiones non solet curia domini regis tueri*), and Bracton adds that the royal courts do not intervene *nisi aliquando ex gratia*. Dr. Henry, however, could not ignore the local law embedded in the *Eyre of Kent*, though he explains that he is not dealing with mediæval contract in England as a whole, but with contract in the local courts as illustrated by some of their records. He ends his survey at the year 1485 because modern history is then beginning and because the law of contract has then reached a known stage. The action of assumpsit, as Professor Holdsworth's third volume shows, has passed from a delictual to a contractual significance; it has absorbed the greater part of the sphere of debt; and it gives at last an adequate remedy for the enforcement of simple executory contracts.

Early pleadings take us back to the days when the declaration had not only to set forth a good cause of action but also to offer suit—*i.e.* to offer to prove by a sect or following of witnesses that the debt was incurred or the covenant made. Proof in contract cases in local courts was given after judgment, not before it. Judgment is a decision as to which party has the right to make proof and as to what shall be proved. Proof is made by one side only and is non-controversial; witnesses are not cross-examined; evidence is not contradicted. The party which is left with the negation of the issue can "wage its law," the principal denying his liability with the aid of the oaths of his oath-helpers. In the boroughs this old customary proof by compurgation is cherished; among the merchants the inquest is naturally preferred; a merchant from outside the town has an indifferent chance against a resident townsman if proof is by compurgation. Apart from the law-compurgators, who swear a negative and testify that they believe their principal's oath to be true, there is also a method of witness proof, the germ of our modern system of evidence. The witnesses support affirmative allegations and swear

[1] *Contracts in the Local Courts of Mediæval England.* By Robert L. Henry, J. D. (Chicago), D.C.L. (Oxon.) (London: Longmans. Pp. 250. 16*s.* net.)

to matters which they have themselves actually seen or heard. The modern litigant will realize that the ancient practice of the courts was remarkably prompt when proof came from one side only and consisted merely of a limited number of persons swearing a prescribed oath or giving a brief testimony. Dr. Henry says the system of unilateral proof (whether by law-compurgators or by eye-witnesses) was not merely expeditious: he claims also that it usually produced the correct result.

This fresh examination of materials reassuringly fills in the outlines traced by Maitland a generation ago with Sir Frederick Pollock in the *History of English Law* and elsewhere. Here, for instance, is a surmise tentatively made by Maitland in 1890 and now confirmed. In an introduction to the *Court Baron*, when discussing some cases on agreements ("conventions") in the Bishop of Ely's Court at Littleport, Maitland suggested that the local courts might be found to be enforcing agreements not under seal long before the King's courts had developed the action of assumpsit to cover the same case. Dr. Henry is able to establish the point with evidence from the Seignoral Courts, the Courts Merchant and the Borough Custumals. His conclusion here is worth citing both for its own sake and as a good instance of his thoughtful method:

> In addition to the reasons given by Maitland, the fact that parol covenants were not enforced in the local courts at the time of Glanvill when the writ of debt was formulated may have had something to do with the fact that covenants could not be redressed through that writ. When shortly afterwards the writ of covenant was invented, chiefly for the enforcement of leases, the local practice of redressing parol covenants had not yet arisen. By the time that development had taken place it had already become established in the central courts that covenant lay only upon a sealed writing. It was too late then to admit the parol covenant under that writ.

All this is a long way yet from modern notions of contract based upon consideration, even if occasionally there are hints of features still visible in section 4 of the Sale of Goods Act. The stages are indicated by some of Dr. Henry's chapter-headings. These include the parol recognizance in court, the tally, the covenant of warranty, pledge contract, surety promise, delivery promise and covenant for services. In his preface he comments on the general uniformity of the custumary law in different districts and different courts, on the unifying influence of the travelling merchant, and on the slowness of legal change. His final chapter (on the God's penny and earnest) ends with a summary of the five principal characteristics of the mediæval contract enforced in the local courts. Contracts, he says, were promissory, formal, public and unilateral, and they were based on an executed *quid pro quo*. For the necessary elaboration of this abbreviated classification one must turn to Dr. Henry's pages. It is good to find that the publications of the Selden and other learned societies encourage such a book as his. It will repay its debt by drawing fresh readers to examine the original materials.

CECIL T. CARR.

"LA CHIAMATA IN CAUSA DURANTE L'EVIZIONE." [1]

This is an interesting and valuable comparative study of the law relating to evictions, in which the learned author deals not only with the Civil Law and with the provisions of the various European Codes, but also with the early English law relating to the matter.

The author's main theme is that the right of recourse by the evicted person against prior vendors has arisen from a mistaken point of view adopted by mediæval civilians in Italy, France, the Netherlands and Germany, owing to their failure to distinguish between the stipulation and the execution of a contract. He argues that a similar view prevailed in England in the Middle Ages.

Professor Ricca-Barberis is to be congratulated on an extremely able and critical study of a very difficult topic. His work is a veritable mine of information as to the sources of the law on the subject.

H. C. G.

INDONESIAN ADAT LAW.

We announce the publication of *Adatrechtbundel* (*Indonesian Adat Law Volumes*), *Vols. XXV and XXVI*, edited by the Board of the Adat Law Foundation at Leyden (Holland) at the request of the Royal Institute for the Philology, Geography and Ethnology of the Dutch Indies.

The complete table of contents of the twenty-five volumes, inserted in Volume XXV, gives an idea of the enormous material concerning Indonesian Adat Law already collected by the Committee consisting of well-known Dutch orientalists of Leyden University and highly placed Indian officers. As can be seen, the topic for investigation is not confined to the Dutch Indies only, but the volumes contain also extensive collections of data relating to other Indonesian areas: the Philippines, the Malay Peninsula, Madagascar and the Indonesian parts of Formosa, Southern Siam and Indo-China.

Volume XXV recently published is a so-called "*Miscellaneous*" volume containing data from nearly all branches of law, in which the field of investigation has been divided in accordance with the classification in Professor van Vollenhoven's standard work on Indonesian law. Of special interest is the native description of lawsuits of the Toradjas of Central Celebes, edited by the late Dr. Adriani, the much-regretted ethnologist and linguist of the Dutch Indies.

Of Volume XXVI, *Malay Territory and Borneo*, the greater part treats with the Malay Peninsula and contains in the main excerpts on indigenous law from a great number of scarce books and articles.

Anyone dealing with indigenous law will follow with interest the continuation of this important series.

[1] By Mario Ricca-Barberis. (Bocca, Turin, 1924, pp. 77, Lire 8.)

We have also to acknowledge :

Dicey's Conflict of Laws. Fourth Edition. By A. B. Keith. (London : Stevens & Sons, Ltd., and Sweet & Maxwell, Ltd.). Pp. cxxiv + 1056. Price £2 12*s.* 6*d.* net.

Comparative Colonial Policy. By V. Shiva Ram. (Calcutta : Longmans, Green & Co., Ltd.) Pp. xx + 297.

Consular Privileges and Immunities. By Irvin Stewart. (New York : Columbia University Press.) Pp. 216. Price $4.00.

The English and Empire Digest. Vol. xxx. Intoxicating Liquors. Judgments and Orders, Juries, Land Improvement, Land Tax, Landlord and Tenant (Parts I–VI.) : Vol. xxxi. Landlord and Tenant (Parts VII–XXVII). (London : Butterworth & Co.)

Académie de Droit International : Recueil des Cours. Vols. 6–8. (Paris : Librairie Hachette.)

L'Etat Actionnaire. By P. O. Lapie. (Paris : Librairie Dalloz.) Pp. 165. Price Frs. 15.

La Nationalité des Personnes dans l'Empire Britannique. By Robert Kiefé. (Paris : Rousseau.) Pp. 189.

Précis de droit international privé. Second edition. By P. Arminjon. (Paris : Librairie Dalloz.) Pp. 303. Price Frs. 35.

Variationen über richterliche Zustandigkeit zur Prüfung der Rechtmässigkeit des Gesetzes. By Fritz Morstein Marx. (Berlin-Grunewald : Dr. Walther Rothschild.)

PERIODICALS RECEIVED

The Canadian Bar Review.—Vol. v. No. 1. January 1927.

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INTERPRETATION IN ENGLISH AND CONTINENTAL LAW.

[*Contributed by* PROFESSOR HERBERT A. SMITH, *Faculty of Law, McGill University, Montreal.*]

EVERY lawyer is familiar with the difficulty of drawing an exact line between questions of law and questions of fact, a difficulty which has been accentuated in England by the local practice of employing the jury as a tribunal for the trial of civil suits. The reason why we find it hard to draw the line is that in the last analysis it is not there at all. Every question of interpretation, whether the document to be interpreted be a statute, a will, a contract, or even a group of earlier decisions, is ultimately an attempt to discover what some other person meant on some past occasion, and every such question raises a pure issue of fact.

Interpretation of Words.—If this be so, it is clear that in a large class of cases evidence and interpretation are really directed towards the same end. A man's intention may be expressed either in words or by conduct or by a mixture of the two, which, indeed, is the common practice. Words are only one form of conduct, and the intention which they convey is necessarily conditioned by the context and circumstances in which they are written or spoken. No word has an absolute meaning, for no word can be defined *in vacuo* or without reference to some context. If any words, such as the technical terms of science, appear to have only one meaning, it is because in practice they are only used in a particular scientific context. Where their use is not thus restricted, even technical terms at once develop a variety of meanings and definitions. The chemist may define the words "carbon monoxide" by means of a chemical formula, but it is equally legitimate for the motorist to define it as the gas which is emitted from the exhaust of a car. Each definition is perfectly accurate and appropriate in its proper context.

The practical work of the Courts is very largely a matter of ascertaining the meaning of words, and their function therefore

becomes the study of contexts. Since the number and variety of contexts is only limited by the possibilities of human experience, it follows that no rules of interpretation can be regarded as absolute. This principle is fully recognized by the Interpretation Act of 1889,[1] which qualifies the whole body of so-called rules by the all-important proviso that they are only to be applied " unless a contrary intention appears." If the same principle had always been extended to the rules invented by judges and text-writers we might have been spared some serious miscarriages of justice. In so far as rules of interpretation are made rigid they frequently operate to defeat the intentions of the writer, just as the rigid application of rules of evidence amounts in countless cases to a device for preventing the Courts from ascertaining facts.

For example, our Courts have laid down an arbitrary rule that the word " children " in a will must always be taken to mean " legitimate children," unless the testator has indicated the contrary in the actual text of the will itself.[2] The most overwhelming evidence of his real intention is rejected, unless he happens to have inserted some explanatory words in the text of the document, a process which some judges have described as " making his own dictionary." In these cases the courts have attempted to give an absolute meaning to the word " children " in defiance of the principle that the meaning of words must always depend upon the whole context, and not merely the literary context, in which they are used. The result is that the intention of the testator is defeated, and the purpose of the law itself is also defeated, for it is the purpose of the law to give effect to his intentions.

A good example of the triumph of pedantry over justice is to be found in the case of *National Society for the Prevention of Cruelty to Children* v. *Scottish National Society for the Prevention of Cruelty to Children*,[3] where the two charitable societies were disputing the right to a legacy. The testator, who lived in Edinburgh and had all his interests in Scotland, bequeathed a legacy to the " National Society," and the Court of Session held[4] that evidence might be admitted to show that he meant the " Scottish National Society." If there had been no charity of the same name as the appellants, or if any other obvious slip had been made, this evidence would have been admitted as a matter of course. But apparently

[1] 52 and 53 Vict., c. 63. The proviso is repeated in every section.
[2] *Hill* v. *Crook*, 1873, L.R. 6 H.L. 265. *In re Pearce* [1914] 1 Ch. 254.
[3] [1915] A.C. 207.
[4] [1913] S.C. 412.

some errors may be explained and others may not. If the testator uses a name that fits nobody, we are allowed to explain what he really meant. If he uses a name that happens to fit some one, then we cannot explain that it was used in error. Unfortunately it happened in this case that the words used chanced to be the correct legal title of an English society, and the House of Lords reversed the decision of the Scottish Courts, though Lord Dunedin admitted that the result of the decision would be to defeat the testator's intention. The case is an admirable example of the fallacy of maintaining that any words can have an absolute meaning as distinguished from the sense in which they are employed by their writer. What the House of Lords did was to substitute the official meaning of the words in question for the meaning which they had in the mind of the testator. Putting the matter in another way, they began by creating a presumption that he used the words in the correct official sense, and then refused to admit evidence to show that he might have used them in some other.

Interpretation of Statutes.—The problem of the interpretation of statutes requires special attention. Statutes are usually drawn by expert draftsmen working under well understood conventions, and it is to be expected that the draftsmen will normally conform to the rules of their craft. The defining of these conventions by the Interpretation Act is therefore entirely right and proper, subject to the general proviso that the rules only apply "unless a contrary intention appears." That is to say, the rules are really laid down for the guidance of the draftsmen, and we may reasonably assume that the draftsmen do their work with these instructions in mind. The rules of the Act, therefore, form part of the general context which we must study in order to ascertain the meaning of any particular enactment, and the same principle applies to the definition and interpretation clauses which are frequently to be found in various statutes.

In this matter Parliament has been wiser than the Courts, for the judges have invented for their own use certain arbitrary rules designed to exclude in part the study of the context, with the necessary consequence that in many cases they defeat the intentions of the Legislature. When the case of *R.* v. *Bishop of Oxford* came before the Court of Appeal in 1879[1] the judges not unreasonably referred to the speech of Lord Chancellor Cairns in the House of Lords for assistance in elucidating the policy and meaning of the

[1] [1879] 4 Q.B.D. 525.

Public Worship Regulation Act of 1874. For this they were subsequently rebuked by Lord Selborne,[1] and the rule seems now to be firmly riveted upon English practice that in no case are the courts to seek the aid of parliamentary debates, reports of Royal Commissions, or other preliminary documents, when endeavouring to interpret the obscurities of a statute. Lord Halsbury even committed himself to the paradox of asserting [2] that the draftsman of a statute was the worst possible person to interpret it, apparently because he actually knew what it meant.

This doctrine does not seem to have become firmly established until quite recent times, and its obvious effect is to bring the rules of legal inquiry into direct conflict with the methods of all rational investigation in the historical or scientific field. Sometimes it happens that the issues to be determined by the Courts are essentially historical in character, and decisions have been given in some of these cases which have made " lawyers' history " a term of derision among historians.

Continental Point of View.—Before examining further the logic of the modern English doctrine it is convenient to observe that it creates a new and needless breach in the relations which connect our law with the general legal tradition of Europe. In the domain of learning provincialism is usually near akin to pedantry, and a doctrine which has clear geographical limitations will generally be found to have a corresponding intellectual narrowness. Blackstone taught many generations of law students to despise the foreigner, and the strong, silent hostility of English lawyers to European ideas has undoubtedly been responsible for many indefensible anomalies in our law.

It would be easy to multiply authorities to show that the broad doctrine of the context is amply recognized in Continental Law without the arbitrary restrictions that have been imposed by the modern English practice. A paragraph in Dalloz conveniently summarizes the principle in a few words :

L'exposé des motifs de la loi, sa discussion publique, d'une manière générale, les travaux préparatoires de la loi, peuvent être d'un grand secours pour l'interprétation de la pensée du législateur. Mais les opinions individuelles émises à la tribune ne sauraient prévaloir contre le texte.[3]

In Planiol's *Traité Elémentaire de Droit Civil*, which is the modern

[1] *S.E. Ry. Co.* v. *Railway Commissioners* (1881) 50 L.J.Q.B. 201, 203.
[2] *Hilder* v. *Dexter* [1902] A.C. 474.
[3] *Répertoire Pratique*, vo. *Lois*, no. 567 ; vo. *Contrat de Mariage*, no. 3503.

French equivalent of Blackstone and Stephen, we find the same doctrine expounded a little more fully: Speaking of those cases where "*la loi a statué, mais le sens est douteux,*" he says:

C'est en ce cas, à proprement parler, qu'il y a lieu à interprétation. La première chose à faire, pour lever le doute, est de consulter les travaux préparatoires de la loi (discussions des Chambres, rapports, exposés des motifs, etc.). Là se trouve souvent la pensée qui a guidé le législateur. Cependant ces documents n'ont pas toujours l'autorité qu'on leur prête. D'abord l'orateur, l'auteur du rapport, etc., a pu se tromper, commettre un oubli, avoir mal lu un texte, etc. Nos archives parlementaires fourmillent d'exemples de bévues de ce genre. Ensuite les discussions, surtout dans une assemblée un peu nombreuse, reflètent souvent des opinions individuelles, en contradiction avec la pensée vraie de la loi. Aussi est-ce une rémarque souvent faite que les travaux préparatoires fournissent des armes à tous les partis et que les diverses opinions en présence y trouvent des arguments qui s'annulent réciproquement. Enfin, et ceci est surtout vrai pour les travaux préparatoires du Code civil, les procès-verbaux des séances sont souvent trop brefs pour qu'on puisse en tirer profit. A ce point de vue nos documents parlementaires, où sont réproduits par la sténographie les moindres incidents des discussions, sont beaucoup plus utiles que les procès-verbaux, souvent insignifiants, du Conseil d'État.[1]

It will be noted that Planiol distinguishes carefully between the weight and the admissibility of parliamentary discussions. Defending the English practice in the celebrated Yorkshire education case[2] Farwell L.J. argued that no attention should be paid to the debates in Parliament because interested parties might often misrepresent the policy or effect of a statute, an argument logically on a par with the old rule of evidence which excluded the testimony of interested parties on the ground that they might be tempted to tell lies. In the nineteenth century the common sense of Parliament rejected the rule as a principle of evidence, but the pedantry of certain judges gave it a fresh lease of life as a principle of interpretation.

I will only add one passage from an Italian author in further support of what may be called the continental point of view. Chironi puts the matter thus:

I motivi che indussero il legislatore a modificare quest' ultimo (*i.e.* the previous law), *od a completarlo, indicano qual sia lo scopo dalla legge, il quale è così fonte d'interpretazione, non in sè, ma in quanto il legislatore lo comprese; ed i lavori preparatorii, le relazioni, le discussioni; la stessa*

[1] 7th ed., vol. i, p. 86, para. 218.

[2] *R.* v. *West Riding C.C.* [1906] 2 K.B. 676, at 716. The decision, afterwards reversed, is a remarkable example of the defeat of the well-known policy of Parliament by refusing to consider the text of a statute in the light of its history.

relazione del Ministro nel presentare il progetto di legge alla sanzione sovrana, e la letteratura giuridica sul tema, danno ampi materiali per siffatte indagini. Finalmente è di grande giovamento il risalire di un complesso di disposizioni, ad un sistema generale che dimostri nel rapporto fra le diverse parti della legge, il pensiero del legislatore, il suo criterio nel formarla.[1]

Continental jurists draw a broad distinction between what they call the " grammatical " and the " logical " interpretation of statutes. By the former they mean the attempt to give words a rigid and absolute meaning divorced from their context in the general body of materials indicating the legislative intention. By logical interpretation they mean the study of the statute in the whole of its historical and juridical context. For a formal statement of the doctrine of " grammatical " interpretation it would be hard to improve upon the words of Cockburn, C.J., in *R.* v. *Hertford College*,[2] decided in 1878 :

> We are not, however, concerned with what Parliament intended, but only with what it has said in the statute. The statute is clear, and the parliamentary history of the statute is wisely inadmissible to explain it, if it is not.

Of course the whole question at issue is begged by the word " clear." Upon this point Chironi very aptly remarks :

> *Quando la legge è chiara la interpretazione non è necessaria, ma la chiarezza non deve essere limitata alla semplice locuzione.*[3]

No words can be " clear " apart from their context, and any rule which limits the context to the particular document in which the words appear is wholly arbitrary and unreasonable.

Commercial Cases.—In commercial cases our practice is more rational, and in the interpretation of business contracts every circumstance is examined which can throw light upon the intentions of the parties. It is true that the general principle has never been conceded in the abstract, and it is customary to lay down the rule in the form that " evidence is admissible to explain, but not to contradict a written document." But it is obvious that no logical distinction can be drawn between " explanation " and " contradiction." If we call a witness to prove that the word " not " has been omitted by a clerical error, are we explaining the document or

[1] *Istituzioni di Diritto Civile Italiano* (1888), vol. i, p. 15. See also Schuster, *Principles of German Civil Law*, p. 10, and Williams, *Sources of Law in the Swiss Civil Code*, p. 47.

[2] 3 Q.B.D. 693, 707.

[3] *Op. cit.* p. 15.

contradicting it? Is it explanation or contradiction to show that the writer meant £2,100 when he actually wrote £1,200?[1] Our practice is better than our doctrine, and in commercial cases the refinements of the textbooks do not generally impede the actual administration of justice.

Thirty years ago the English Court of Appeal solemnly decided that they might safely refer to the envelope in order to determine the meaning of the words "Dear Sir" in a letter.[2] *Parturiunt montes . . .!* There is something ridiculous in the idea of a bench of judges gravely considering whether the law of England permitted them to use their intelligence like ordinary rational beings. In the solution of commercial controversies common sense has fortunately prevailed, but in the interpretation of statutes we suffer from the attempt to treat documents as if they could exist *in vacuo*, or could be interpreted apart from the whole body of circumstances which gave them birth.

The celebrated case of the envelope is a good illustration of the elementary truth that no piece of human writing is complete in itself. We make our writings on one or more pieces of paper, as the case may be, or we divide them for our own convenience by means of titles, chapters, and other mechanical devices. But all these arrangements are made for our convenience alone, and they have only an incidental bearing upon the meaning of the particular words under discussion. Every document, whether it be a statute, a contract, or anything else, is born into a complex world which already contains a thousand factors that influence its meaning. The relevance of these various factors will vary infinitely according to the circumstances of each particular case, and only common sense can tell us what to consider and what to reject. No arbitrary rule can assist us in determining the meaning of the writer, and the attainment of this end should be paramount to all rules. Everything should be admissible, though not everything should carry weight.

Consideration of Intention.—Common-sense rules demand common-sense qualifications, and the rule that evidence cannot be called to contradict a written document has a sound basis. Every writing involves at least two parties, and we have to consider the intention which the writer conveys to the reader as well as that which he has formed in his own mind. Obviously he cannot be permitted

[1] *Webster* v. *Cecil* (1861), 30 Beav. 62.

[2] *Pearce* v. *Gardner* [1897] 1 Q.B. 688, a case upon the Statute of Frauds.

to plead an intention which he never attempted to convey, and he must be taken to have used his words deliberately in the sense in which they would naturally be understood. Where the law attaches exclusive authority to the written words, as in the case of statutes and wills, it is even clearer that the whole intention must be found in the text, and no effect can be given to any intention which is not thus expressed. But this does not mean that " we are not concerned with what Parliament intended." Our endeavour should be to discover the intention of Parliament as expressed in the terms of the Act, and to do this we should be prepared to consider every circumstance which may have influenced the choice and use of the written words. A statute, like a contract, usually embodies a formula which has been agreed upon after discussion between various interests, and a study of the discussion is logically just as necessary in the one case as in the other. If we refuse to consider the reports, debates and the general body of " travaux préparatoires " we run a risk of bringing the law into conflict with the facts. The lawyer may easily arrive in this way at an interpretation which the historian knows to be untrue.

Interpretation of the Canadian Constitution.—A conspicuous and important example of this form of error may be found in some recent decisions of the Privy Council upon the interpretation of the Canadian Constitution. The 91st section of the British North America Act [1] runs as follows :

> It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces ; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated ; that is to say : (*then follows a list of twenty-nine subjects*).

The next section assigns sixteen subjects to the exclusive authority of the provinces, including (No. 13) " property and civil rights in the province."

The history of this legislation is well known. The scheme of confederation was drawn up in Canada in 1865, immediately after the close of the American Civil War, and the Canadian statesmen

[1] 30–31 Vict., c. 3.

decided to adopt a federal system which should be the exact reverse of that obtaining in the United States. In Canada the general residue of undistributed power was to rest with the federal Parliament instead of with the provinces, and it was made abundantly clear that this general residuary power was intended to cover all matters which might prove to be of general importance throughout the Dominion. In explaining the scheme to the Canadian Parliament Macdonald said :

I am strongly of the belief that we have, in a great measure, avoided in this system, which we propose for adoption of the people of Canada, the defects which time and events have shown to exist in the American Constitution. . . . Here we have adopted a different system. We have strengthened the general government. We have given the general legislature all the great subjects of legislation. We have conferred on them, not only specifically and in detail, all the powers which are incident to sovereignty, but we have expressly declared that all subjects of general interest not distinctly and exclusively conferred upon the local governments and local legislatures shall be conferred upon the general government and legislature. We have thus avoided that great source of weakness which has been the cause of the disruption of the United States. We have avoided all conflict of jurisdiction and authority, and if this constitution is carried out, as it will be in full detail in the Imperial Act to be passed if the Colonies adopt the scheme, we will have in fact, as I said before, all the advantages of a legislative union under one administration, with at the same time the guarantees for local institutions and for local laws, which are insisted upon by so many in the provinces now, I hope, to be united.[1]

It would be easy to multiply quotations to show that this fundamental principle of Canadian confederation was fully understood in Canada both by the supporters and opponents of the scheme. The same view was emphasized by all the speakers in the Imperial Parliament, where the measure passed rapidly through both Houses without a hint of amendment or of opposition. A few sentences from Lord Carnarvon's speech in the House of Lords will be sufficent to indicate the interpretation placed upon the bill by the Government of the day :

The real object which we have in view is to give to the central Government those high functions and almost sovereign powers by which general principles and uniformity of legislation may be secured in those questions that are of common import to all the provinces ; and, at the same time,

[1] Kennedy, *Documents of the Canadian Constitution*, pp. 605–6. Later on Macdonald says that the Dominion Parliament is to control "the general mass of sovereign legislation."

to retain for each province so ample a measure of municipal liberty and self-government as will allow and indeed compel them to exercise those local powers which they can exercise with great advantage to the community. . . .

In closing my observations upon the distribution of powers, I ought to point out that, just as the authority of the central Parliament will prevail whenever it may come into conflict with the local legislatures, so the residue of legislation, if any, unprovided for in the specific legislation which I have explained, will belong to the central body. It will be seen, under the 91st clause, that the classification is not intended " to restrict the generality " of the powers previously given to the central Parliament, and that those powers extend to all laws made " for the peace, order, and good government " of the Confederation—terms which, according to all precedent, will, I understand, carry with them an ample measure of legislative authority. [1]

All this is matter of history, and to the eye of the historian the broad principle of Canadian confederation is abundantly clear. Whatever was of common interest to Canada was to be within the competence of the Dominion Parliament, while the provinces were to concern themselves with such matters as were of purely local importance. In their innocence the Fathers of Confederation thought that they had, as Macdonald said, " avoided all conflict of jurisdiction and authority," for it was evident to their minds that the Dominion must be free to judge for itself what matters were of common concern to the whole nation. Lord Carnarvon was of the same opinion, but the vision of the statesmen had failed to make sufficient allowance for the pedantry of the lawyers, and sixty years of constant litigation have resulted in giving Canada a Constitution which in principle is practically the reverse of that contemplated by her founders.

Space does not permit us to trace in detail the history of this great misunderstanding, but a sentence from the Privy Council judgment in the case of *Toronto Electric Commissioners* v. *Snider* [2] will be sufficient to emphasize the contrast. Lord Haldane there says :

It appears to their Lordships that it is not now open to them to treat *Russell* v. *The Queen* [3] as having established the general principle that the

[1] Hansard, vol. 185, coll. 563, 566.

[2] [1925] A.C. 412. The statute in question was one which provided for arbitration in industrial disputes throughout Canada.

[3] [1882] 7 A.C. 829. In this case the Privy Council had upheld the validity of the Canada Temperance Act, which established a system of local option throughout the Dominion.

mere fact that Dominion legislation is for the general advantage of Canada, or is such that it will meet a mere want which is felt throughout the Dominion, renders it competent if it cannot be brought within the heads enumerated specifically in s. 91.

These words might have been drafted with the express purpose of contradicting Sir John Macdonald, when he said :

> In the proposed Constitution *all matters of general interest* are to be dealt with by the general Legislature ; while the local Legislatures will deal with matters of local interest, which do not affect the Confederation as a whole, but are of the greatest importance for their particular sections.[1]

The result of the decisions is that the real residuary power is now to be found in the words " property and civil rights," over which s. 92 gives exclusive jurisdiction to the provinces. Considered grammatically and apart from their historical context, these words are amply sufficient to cover the whole field of possible legislation outside pure criminal law, and it then becomes necessary to treat the matters specifically enumerated in s. 91 as so many exceptions to the general legislative power of the provinces. In other words, the principle of American federalism has been substituted for that agreed upon at Quebec in 1865.

At the same time it was essential to find some meaning for the sweeping words in s. 91 by which the statesmen of Confederation thought that they had given " all matters of general interest " to the Parliament of Canada. A new theory made its first appearance in 1922, when the Privy Council explained that the general words of s. 91 had been inserted to enable the Dominion Parliament to deal with cases of war, pestilence and similar national calamities.[2] This doctrine was reaffirmed in the Snider case in 1925, and presumably it must now be accepted as the orthodox judicial exposition. It is open to the obvious criticism that nobody had ever suggested such a construction of the words when the whole question of confederation was under discussion sixty years before.

Rule of Interpretation Conflicts with History and Theory of Law.— We may conclude by noting two points at which the rule of interpretation that we have been examining comes into conflict with the history and theory of our own law. Three centuries ago the Court of Exchequer laid down in *Heydon's Case* [3] a sound doctrine of interpretation, which is still quoted in the textbooks, though it has been

[1] Kennedy, p. 602.
[2] *In re the Board of Commerce Act* [1922] 1 A.C. 191.
[3] 3 Co. Rep. 7b. See Maxwell on *Interpretation of Statutes*, 4th ed. p. 30.

robbed of its practical application. It was declared that in interpreting a statute the four points for consideration were : " (*a*) What was the common law before the making of the Act ? (*b*) What was the mischief and defect against which the common law did not provide ? (*c*) What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth ? (*d*) The true reason of the remedy." This principle is in entire agreement with the broad doctrine laid down by modern continental jurists, and it is obvious that for answers to the last three of these four questions a study of the proceedings in Parliament is essential. To exclude them is equivalent to excluding a study of the preliminary negotiations and surrounding circumstances from the question of the interpretation of a contract.

Secondly, it is clear that the rule comes into conflict with the doctrine of " judicial notice," which forms a necessary part of our law of evidence. The judges are supposed to know—or at any rate to be free to study—the well-established facts of nature and history, since it is obvious that these cannot usually be proved by the direct testimony of witnesses. Parliamentary proceedings, the reports of commissioners and similar documents form an important part of the historical records of the nation, and the historian who ignored them would only stigmatize himself as incompetent. A logical application of the doctrine of judicial notice would require the judge to study all these documents as a material part of the history of the statute under discussion. The rule in its present form is simply one which compels him to close his eyes to facts.

THE LAW OF STATE LANDS IN PALESTINE.

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The State, or Mirie lands of the Ottoman Empire, are dealt with by the Ottoman Land Code, which dates from the year 1274 H., corresponding to A.D. 1858. The Code belongs to a period of great legislative activity in the Ottoman Empire. Other notable codes, which belong to it, are the Penal Code, the Codes of Civil and Criminal Procedure and the Great Codification of the Sharia Law, known as the Mejelle. These Codes were framed to a greater or less extent under French influence. Where French law could be directly borrowed, as in the case of the Codes of Civil and Criminal Procedure, the traces of French influence are strongly shown by a clearness of arrangement and expression which are characteristically French. In the case, however, of Codes dealing with matters peculiar to the Ottoman Empire, these marks are largely absent. Thus, the Penal Code attempts to follow its great French predecessor, but does so on the basis of a customary morality which is Turkish and not French ; the result is a code which is obscure alike in definition and arrangement. The Land Code, in the same way, dealt with conditions of Revenue Administration, which had no parallel in France. As might be expected, therefore, it is badly arranged, obscurely worded, and essential matters are often ill-defined.

It was, however, a peculiarly urgent piece of legislation. The old Ottoman system of Land Revenue Administration was based on feudal conditions, and those conditions had been abolished some nineteen years before, in the year 1255 H. Their abolition was due to a desire to place the army on a modern basis, under professional officers who were paid by the State instead of under feudal war-lords. It does not seem to have been realized that this measure would throw the Land Revenue Administration into confusion. However this may be, that Administration ceased to exist during the nineteen years prior to the passage of the Land Code. During

that period the land taxes, consisting mainly in the tithe, were collected by tax-farmers, who obtained their positions by purchase. Their interest lay in exaction, with the result that the tenants of the State were robbed and misused to an extent which greatly reduced their power of production, and deprived the State of the revenues which depended on that production.

The framers of the Land Code dealt with this situation with remarkable success. For the first time in Ottoman history, they set up a system of Land Registration, based on title-deeds, and, by means of supplementary legislation, created an administrative machine, which is still in use.

From the legal point of view, they revolutionized the theory of State Ownership, and conferred on the tenantry of the State rights which correspond to those of Equitable Ownership in English law. They thus converted a population of tenants at will into one of peasant proprietors.

Their work was, however, based on the tithe system, and that system has inherent defects which unfit it for progressive conditions.

For this reason it is considered necessary by the Government to replace it in Palestine by a land-tax, calculated on the net average income of each holding. This tax will be payable in cash, at stated periods, and will not be liable to variation, except for the purpose of alleviating widespread agricultural distress. As such a change goes to the root of the existing Land Revenue System, its adoption will necessitate a complete recasting of the Land Code. We are, therefore, on the eve of a change as momentous in character as that which was marked by the introduction of the Land Code itself. At such a time it is of peculiar interest to review the causes which led to the framing of the latter, to give a general idea of the policy on which it was based and to estimate the extent of its success and failure.

Although it is not the writer's intention to deal, in this article, with matters concerning future land policy, it may be that an examination of the Land Code in the directions indicated will serve to point out lines along which pending changes may, with advantage, proceed.

Administration by Feudatories.—As already stated, in the year 1255 H. (= A.D. 1839) the fiscal administration of the Turkish Empire was profoundly changed by the abolition of the Feudal system. Until that date the Land Revenue was administered by feudatories called Ziamets and Timars. The former held the

greater and the latter the smaller fiefs. They paid a fixed sum of money each year for the office, and its attendant privileges, and in addition were obliged to furnish, in time of war, quotas of armed men in proportion to those payments.

Within his fief each feudatory collected the taxes and distributed the holdings of the cultivators. He issued such title-deeds as were needed, under his own seal. He took for himself all lands which from time to time fell vacant through failure of heirs and other causes. These he either sold to other cultivators or appropriated to his own use. The chief tax which he was authorized to collect was termed the Tithe. The word indicates a proportion of the produce of the land, which generally, but not necessarily, amounted to a tenth.

Although the feudatories exercised extensive and practically arbitrary rule over the tithe-paying lands in their fiefs, they were not in any sense the owners of those lands. The Sultan was legally their owner, and since his deposition the Head of the State is regarded as holding the same rights. The feudal lords held merely as the servants of the Sultan, and might be deprived of their fiefs at his pleasure. Subject to this important condition, their office was inherited through males. The somewhat precarious nature of their tenure operated to make the feudatories prefer their own enrichment to the well-being of the agricultural population. They were, in fact, in much the same position as hereditary farmers.

These tithe-paying lands are the State, or Mirie lands, with which this article is primarily concerned. They will be referred to, indifferently, as Mirie or State lands, and their cultivators as Mirie holders.

Side by side with the Mirie tenure, certain mulk or freehold properties existed, and were, from time to time, added to. They correspond very closely to the freehold which arose in England under feudal conditions.

Finally, we have the Wakf, or dedicated lands, which may be compared with the properties held in mortmain in medieval Europe. To understand the policy of the Land Code, we must give a short account of the manner in which these three tenures originated and were developed.

Mirie Lands.—During the period of the Moslem Conquest the lands of the conquered populations were either left in the hands of their original owners or were distributed among the soldiers of the conquering army as freehold, or mulk. In Palestine, and in

Syria as a whole, the former method was adopted. The conquered peoples were left in cultivating possession, but their rights of ownership were transferred to the Sultan. They were thus reduced to the position of tenants at will. They had to pay taxes for their lands, of which by far the most important was the tithe. This means that the State is entitled to take a share of the produce of all Mirie lands at each harvest, amounting to a tenth, or thereabouts, of the gross amount produced. The process by which this was done was by appointing certain threshing-floors to each village and compelling the villagers to stack the whole of their produce on these floors. Assessors were then sent to estimate the gross amount of each kind of crop, and until their arrival no threshing was allowed to take place and no crop might be removed. The assessors estimated the share due to Government, and that share might, in theory, be taken in kind. In practice, however, it was converted into a cash demand on the basis of a scale of prices, which was issued under the authority of the State. It will be perceived that the tax was levied on gross and not on net profits. For this reason its severity automatically increased with the badness of the season. It is not difficult to see that, in a really bad year, it constituted an inroad of undefined magnitude on the capital of the cultivator. As might have been expected, it is rare to find capital employed to an important extent in the development of the Mirie lands of Palestine. Though the share of the State was nominally a tenth of the produce, the proportion thus indicated was not always adhered to. When we occupied the country the proportion collected was 12½ per cent. It has since been reduced to the customary tenth. In the days of the feudatories, and to a still more marked extent under the regime of the farmers after the abolition of the feudal system, the proportion collected in the name of the State was the amount which could, in practice, be exacted by the feudal lord or farmer concerned. Under the regime of the former, some consideration had to be given to the future. Exactions would not normally reach the point of diminishing returns. Under the regime of the farmers, however, this consideration was not regarded, and exactions reached such a pitch that over certain areas the cultivators abandoned their villages *en masse*.

The Mirie area was added to, from time to time, by the breaking up of waste lands, with the consent of the feudal lord.

On the death of a Mirie holder his heirs, as defined by the Sharia Law, inherited his cultivation. Even this privilege was not con-

ceded without a struggle, as, in the early days of Mohammedan rule, an attempt was made to introduce a theory of escheat, which would compel all heirs to repurchase their holdings from the State. As might have been expected, it was found impossible to enforce this rule in practice. The attempt was therefore abandoned. It thus comes about that the right of free inheritance appears to be almost the only right of the Mirie cultivator which was recognized by law before the advent of the Land Code.

Freehold Properties.—The mulk, or freehold properties, were on a very different footing from the Mirie lands. The mulk owner was recognized in the fullest possible manner by the Sharia Law. In the eyes of that law, his rights over his property were precisely analogous to the Sultan's rights over Mirie lands. Each was a full and absolute owner. As the tithe was considered in the light of a rental payable by the occupier to the owner, it could not be levied on mulk. Mulk properties were, however, liable to be taxed on their value to an extent which, in comparison with the tithe, was very trifling. Subject to the payment of this tax, the mulk owner could do exactly as he pleased with his property. Mirie lands were also subject in theory to the same tax, in addition to the tithe. But as the tithe sufficed to cover and excuse an almost unlimited demand, the importance of the tax on value, known as the Werko, was negligible, until the advent of the Land Code.

We have already seen that, in some countries, mulk properties arose from the distribution of conquered territory among the conquering soldiers. This did not take place in Palestine, where the existing mulk properties arose in three ways. The first was by the attachment of small areas of convenience to houses within the limits of towns, and also by building within those limits. This kind of mulk may be excluded from a discussion which is concerned with agricultural lands.

In the second place, Mirie lands were converted into mulk by building or by the plantation of vines, olives or fruit-trees during the period which preceded the promulgation of the Land Code. During that period, Mirie lands on which these accretions were placed became mulk by virtue of the change.

Thirdly, waste land might be broken up on special terms, which allowed the resulting cultivation to be regarded as mulk.

In view of the unsettled conditions which obtained under the old Ottoman Empire, it was clearly to the advantage of everyone who held or controlled Mirie land to turn it into mulk. The feudal

lords were specially well-placed for doing this, and it is fairly evident that most of the mulk lands now existing in agricultural areas were originated by them. The cultivators of Mirie land, over whom they ruled, would not, as a rule, be allowed to place mulk accretions on any part of their holdings, as by doing so they would decrease the area from which the feudal lord was entitled to collect tithe. The main object of the Timar or Ziamet in creating mulk was not the evasion of the tithe, since this was a tax which he collected, but did not pay. His object was to secure himself against being deprived of his fief. Such deprivation meant the loss of his right to collect the tithe from the Mirie lands within this area, but would not, as a rule, affect his rights to his mulk properties. It is true that the Sultan could confiscate his mulk land in the exercise of his very despotic powers, but deprivation of this kind was of a penal nature and of comparatively rare occurrence.

Wakf Property.—In addition to the advantages which we have enumerated the mulk owner had another valuable privilege. He could turn his property into Wakf by dedicating it to the Almighty. This followed from the fact that he was the owner in law. The Mirie holder had no such power, because he was not an owner in the eyes of the law and could not pass, by dedication, a title which he did not possess. In theory, dedication was intended to devote the property affected and its revenues to some purpose of a religious or charitable nature. In practice, it sufficed to state in the Deed of Dedication that the property should revert to some such purpose on failure of heirs to the line of the dedicator. On those terms, the latter could enjoy all its benefits, both personally and through his heirs, until the extinction of the line. Dedication may be compared with the enfeoffment *ad opus* from which our own Law of Trusts has originated. The medieval owner enfeoffed his friends *ad opus suum* in much the same way as the Moslem, by means of dedication, enfeoffs the Deity when he creates a Wakf. In each case the object of the nominal transfer was the evasion of dues and taxes or the avoidance of escheat. The medieval owner, in the West, used to enfeoff several friends to avoid the possibility of escheat through the death of all the owners. The Moslem mulk owner, for the same reason, conferred ownership on the Deity because He could never die, and escheat, in consequence, could never take place.

As wakf property is protected by the strongest religious and legal sanctions known to the Moslem law, its beneficiaries were seldom molested in their enjoyment. The Sultan himself respected

properties of this class, when no other kind of property was safe from his rapacity.

Thus feudal Turkey provides a picture of a depressed agricultural population of Mirie cultivators who had no legal rights worth considering, and were subject to indefinite exactions. Over them we have the feudatories, who sought to guard against the results of disfavour in high quarters by creating mulk properties at the expense of the tithe-paying lands. These properties tended to be passed into the wakf class, in order to bring them within the only category which was safe from confiscation by the Sovereign or his great Wazirs.

"Imperfect" Wakfs.—The wakfs of which we have hitherto spoken are those of the "perfect" class. That is to say, they arose from the dedication of mulk property. There is, however, a class of wakfs known as "imperfect" which arose from the dedication of some of the benefits of Mirie land. Thus, a right to collect tithe over a certain area might be made the subject of a dedication, or a right of cultivation might be conferred by the same means, subject to the payment of tithe. Such dedication could only be made by the Sultan, or under his express sanction, because the Sultan was the sole legal owner of the Mirie lands.

The object of these "imperfect" dedications was to reward deserving subjects in a fashion which could not be set aside by the Sultan's successor. Mulk properties of the ordinary kind were not available to the Sultan for this purpose, since the Mirie lands were regarded in law as his mulk. In Palestine, large areas were alienated in this way by various Sultans, which are, to this day, enjoyed by the descendants of the original beneficiaries.

"Masha" System.—When in 1255 H. the feudal system was abolished and the Mirie lands were handed over to farmers, a condition of great unsettlement came about. This led, naturally, to a large extension of the mulk area and to a great increase in the dedications of mulk properties. The new mulk was created at the expense of the revenues of the State, while the wakf came into existence at the expense of its control.

Meanwhile the Mirie holders had succeeded in large measure in achieving a certain security of tenure under conditions which, at first sight, would seem to forbid such a possibility. This was accomplished by an extension of the system of holding in common, known in Palestine as "Masha."

The system appears to have sprung up side by side with the

tithe wherever the latter exists or has existed. It was common in India, when we took over the country. Traces of it, side by side with traces of the tithe system, are found in European countries which have outgrown both. It is clear, moreover, that all schemes of inheritance which allow moveable property to be inherited by several persons at the same time must create holdings in common. Such holdings, therefore, continue to be created in the Ottoman Empire. The heirs of a Moslem must hold jointly until they effect a partition. If partition never takes place, the joint holding is perpetuated and the number of co-owners may increase without limit. The tithe system, moreover, encourages holding in common, because, from the point of view of the State, it facilitates assessment, and, from the point of view of the cultivator, it confers the protection which accompanies corporate action.

Under the Masha system the lands of a village are divided annually, or at other customary periods, amongst the co-owners. Each gets one or more plough lands. Until very recently, harvesting was conducted in common and produce was stacked on the threshing-floors without regard to individual ownership. This resulted in a few large stacks, and facilitated assessment. It also facilitated the subsequent division of the crop and the apportionment of the tax between the co-owners, since each owner's share was deducible from the number of plough lands cultivated by him.

Since the Occupation, we have tried to distribute the assessment demand amongst the cultivators at the time of assessment, in order to avoid the petty local tyrannies which used to take place. This has necessitated the separate stacking of each man's crop on the floors. The process secures a fairer distribution between the co-owners, but it takes longer and is more troublesome than the older plan.

It is evident that a village which holds in common has a much better chance of resisting extortion than one in which each cultivator has a separate holding. In the former, every exaction is an injury to the whole community, and will be resisted by it as a whole. In the case of individual holdings, however, those who suffer wrong are balanced by those who have no complaint, and the former are ill-situated for obtaining redress. Moreover, an individual cultivator who makes himself obnoxious may be turned out of his holding on some specious pretext and replaced by a stranger without much difficulty. Confiscation of this kind cannot, however, take place in a Masha village, as in such a village the stranger would have no

chance of benefiting at any stage of the communal processes of agriculture, from the allotment of the plough-lands to the ultimate division of the crop. In this way the Masha system ensures the village against the confiscation of its lands and confers substantial protection against intrusion and minor forms of exaction. Under the arbitrary rule of the feudatories, and, later, under the still more greedy regime of the farmers, it furnished the only guarantee of settled tenure the Mirie holder possessed. In these circumstances it is not to be wondered at that it has extended over an enormous area in Palestine.

In that country, and in other parts of the old Turkish Empire, the Masha system is often accompanied by local forms of inheritance which are not recognized by the law. Thus, in one class of community, each individual becomes entitled to a share in the common lands from the time of his or her birth. In another, males only may be so entitled. In others, the inheritance or participation of women depends on the condition that they marry within the village. Such special inheritances make it still more difficult for a stranger to enter a Masha village, and to this extent add to the protection conferred by holding in common.

The Masha system was, on the whole, beneficial to the State, while security of tenure could not be achieved by any other means. It kept the communities concerned relatively stable, and went a long way towards guaranteeing a continuance of cultivation. It has, however, disadvantages which render it very unsuitable for progressive conditions. In the first place, it offers no inducement to any cultivator to make more than the average effort, or to incur more than the average expenditure in raising a crop. This leads to a low level of cultivation and to the exhaustion of the soil.

In the second place, it is inconsistent with the production of such things as milk, vegetables and fat stock. Hence, lands which are suitable in respect of soil and situation for these valuable products cannot be used for their production if they are held in common.

Thirdly, the Masha system deprives land of its commercial value, since it virtually restricts the market to the members of a single community.

For these reasons the framers of the Land Code recognized the desirability of getting rid of Masha, though, as we shall see later, they were unsuccessful in their attempt to do so.

Reform of the Land System.—The three great abuses of the land system as it existed before the advent of the Land Code were thus

the growth of mulk at the expense of the revenues of the State, the growth of wakf at the expense of State control, and the growth of masha at the expense of agricultural efficiency. Each was the outcome of unsettled conditions, and each constituted an attempt to achieve security in spite of them.

In these circumstances, the first condition of successful reform was to confer security on the agricultural population. The framers of the Land Code sought to achieve this by establishing a system of Land Registration and by enacting that every cultivator of Mirie land should be entitled to the issue of a title-deed in respect of his holding. This in itself constituted a sweeping measure of reform.

In the second place, it was necessary to convince the cultivator that he had nothing to fear from the interference of Government in his cultivation, and in particular that he need not apprehend the possibility of confiscation. For this purpose, the framers of the Code laid down that, in respect of Mirie lands, the State should have no right of resumption or enjoyment in any form whatever. This policy is not stated in the Code in so many words. It is implied, however, in the Articles which lay down the only ways in which vacant land may be dealt with by the Tapou, or Land Department.

Land ordinarily falls vacant either by neglect of cultivation or by failure of heirs to a deceased holder. In the first event, provided that the neglect has extended over a period of at least three years, the State may demand from the negligent holder the payment of the assessed value of the land as the condition of renewal of his title-deed. If he refuses to pay, the property *must* be put up to auction. The State has no power of resuming it. In the second place, any person may occupy land which has become vacant through failure of heirs, provided that he reports his occupation and is willing to pay its assessed value. The case of neglect leading to occupation by a squatter is a matter between him and the title-holder. From the point of view of the State, since the land is cultivated, tithe is presumed to have been realized, and so long as this is the case interference is not permissible. The Code makes provision for dealing with trespass on much the same lines as are usual in other countries, except that the title-holder may not claim either back rents or compensation. This position has been modified by subsequent legislation.

Occupation by a Squatter.—The question of occupation by a squatter, on failure of heirs to a deceased title-holder, is of great

importance. We have seen that any person who reports his occupation, and is willing to pay for the land, can claim a title-deed. If he has occupied the land for ten years or more without dispute he is entitled to the deed free of all cost, notwithstanding that he has never reported his occupation. There are certain persons who are said to have a right of Tapou—that is to say, a right to land which falls vacant through failure of heirs. They include the inheritors of the mulk accretions, if any, such as houses or groves; co-sharers of the deceased title-holder; those who share in a private right of way or of water, which constitutes an easement to the land; and, finally, residents of the locality who are in need of land. Upon the establishment of a claim to the land by a person falling within one of these classes, and provided that the claim is made within the time allotted to the class to which he belongs, the squatter will be ejected, though he is entitled to be repaid what he has disbursed for his title-deed. Holders of the right of Tapou may not, of course, take the land unless, like the reporting squatter, they pay its assessed value.

We thus see that the State has no power of taking or enjoying land, even when it falls vacant. It can do no more than recognize the *de facto* cultivator, while claiming from him the assessed value of the holding. If that cultivator has no right of Tapou—in other words, if he is a mere squatter—he may have to reckon with persons who possess that right. If, however, his cultivation is of more than ten years' duration, during which time the holding has not been disputed, he cannot be interfered with by anybody and has the right to sue the State for a title-deed free of all cost. The secret occupier can be ejected before the expiry of ten years, but, presumably, even in this case, he would be given the option of paying the assessed value and taking a title-deed.

These provisions served and were intended to encourage the cultivation of areas which might otherwise lie unused; they strengthened the claims of local residents to lands in which they might be presumed to have interest, without compelling them to have recourse to the Masha system; they guaranteed the cultivator, who keeps his holding under crop, against confiscation by the State.

Right of Prescription.—The right of prescription against the State is supplemented by a private right of prescription, which enables the cultivator who has no title-deed to make good a claim to the land against the title-holder after ten years' occupation.

This privilege is hedged about by conditions which, to the Western lawyer, appear rather fantastic. Thus, time during which the title-holder was absent from the locality, was a minor, or was under some form of legal disability may be deducted from the period of adverse occupation. Further, the title acquired by private prescription may at any time be lost by the admission of the squatter that his occupation originated in some form of usurpation. The Turkish Courts have also held that an heir who takes exclusive possession cannot claim benefit under these provisions against the other heirs, but must be regarded as a trustee for their interests.

It is clear that the whole of the foregoing provisions are intended to encourage cultivation, and, in so doing, to maintain the tithe revenue.

Quasi-mulk.—With regard to the creation of mulk, the framers of the Code did not care to deny outright the possibility of converting Mirie land to this form of holding. Their hesitation was due to the fact that the right to build and plant, and thereby to create mulk, is provided for in the Sharia Law, which is as much a part of the religion as of the civil life of the Moslem. They, therefore, lay down that building and planting on Mirie land may be undertaken, but that the consent of the Land Department must be obtained, and that the resulting change must not be held to excuse the title-holder from liability to pay an annual sum estimated as being the equivalent of the tithe. The tenure thus created is conveniently known as quasi-mulk. In some respects it is governed by the Sharia Law, and in others by the Land Code. The general principle is that, so long as the land and the accretions remain in the same hands, they are governed by the Sharia Law. When the accretions are independently owned, they are dealt with by the same law, but the land on which they stand comes under the Land Code. The legal provisions required to give effect to these distinctions were complicated and unsatisfactory. They were set aside shortly before the war by a so-called Provisional Law, and since its date building and planting may be undertaken at the will of the holder, provided that he registers and that the changes in the property thus made shall not operate to alter its status in any manner whatever. We may add that, under the law as it originally stood, quasi-mulk reverts to the full Mirie status on the complete disappearance of the accretions. The Courts still have to deal with claims based on the original law, because buildings or plantations dating from a period prior to the passage of the Provisional Law are unaffected by its operation. This

class of case frequently presents complications. It is sometimes difficult to ascertain whether accretions have disappeared or not, whether in their original form they came under the definition of the Land Code, and finally to what extent a given holding has been changed by building or planting upon a portion of its area.

The fact that both the Sharia Law and the Law of Mirie apply to quasi-mulk raises the further series of difficulties associated with a double system of inheritance. The inheritance to Mirie land is provided for by the Land Code. Its provisions in this respect have since been substantially amended. The Sharia system of inheritance, which applies to mulk property and to quasi-mulk accretions, differs from the schemes laid down by the Land Code and subsequent legislation in a very substantial manner.

From the point of view of Land Revenue Administration, the most important result of the Land Code is that quasi-mulk may not be dedicated to a wakf, except in respect of the accretions. On the passage of the Provisional Law already referred to even this limited form of dedication became illegal.

Some sixteen years after the passage of the Land Code the Mulk Titles Act was passed into law. It lays down, in effect, that from the date of its promulgation, mulk lands are those which are registered as such or which are held as mulk by a firman of the Sultan. Taken in conjunction with the provisions of the Land Code, this Act finally prevented the further creation of mulk at the expense of the Mirie area.

Thus, the supply of property of the kind which may be made the subject of a private dedication has been stopped.

Attack on Masha System.—As we have already noticed, the framers of the Land Code were unsuccessful in their attempt to break up the Masha system. We have shown the manner in which they tried to obviate the necessity for its further extension by the provision of adequate security in other ways. Their direct attack on the system is found in an article which provides that an individual title-deed must be granted for each holding to an individual, and which forbids the grant of such deeds to holders in common. The result of this legislation is sufficiently described in the following quotations from the writer's *Commentary on the Land Code* (Art. 8):

Note 2, Art. 8:

When registration was first introduced the authorities were faced with the fact that large areas of Mirie land were, *de facto*, held in common.

The ownership of these lands had to be registered so as to show the facts and at the same time comply with the provisions of the law contained in Art. 8. The two requirements are often contradictory. In the result two methods for the registration of " Masha " lands were adopted. Some of these lands were registered as held in common by all the *de facto* co-owners, each being shown as holding a stated proportional share. Others were registered as owned by the heads of the families whose members were the actual co-owners. The last-named scheme of registration has led to a number of suits, by which the descendants of the recorded owners seek to exclude the heirs of the owners who were not recorded.

Note 3, Art. 8 :

It has been the custom in a number of villages to allow the co-owners to retain a portion of the Masha in individual ownership, and to apply the process of periodical division only to the balance. The principle on which this was carried out has never been recorded in the Land Registers. The result is inextricable confusion. Lands which are recorded as Masha are actually held, without record of the fact, in separate ownership, and, as the process often dates back to ancient times, these separately owned portions were often developed into a subordinate division of Masha, claimed by the descendants of those who originally assumed individual ownership, as co-owners. In some cases the last-named process has even resulted in a fresh set of individually owned plots, based on the subordinate Masha, together with a residual area of the secondary Masha.

Communal Rights. — In accordance with its policy of strengthening the claim enjoyed by residents of a locality to the lands situated in it, the Code contains somewhat elaborate provisions in regard to communal rights of various kinds, such as rights of pasture, rights to markets and threshing-floors and rights of common and wood-cutting. Of these by far the most important is the right of pasture.

The Code states that pasture which has been assigned *ab antiquo* to a given community may not be taken from that community either by the State or by an individual, and that it may not be used for any other purpose whatever. On such an area, no title-deed issued by the State and purporting to give the holder a right to cultivate is of any value, and no period of prescription avails to bar the claim of the community for the restoration of its rights.

In practice the privilege thus conferred is less valuable than it appears to be. To prove an assignment *ab antiquo* is a difficult matter, since the production of a deed purporting to be the original assignment is clearly impossible. The most that can be expected is a deed purporting to confirm an older grant. As, however, village communities are not provided with record rooms or per-

manent establishments of any kind, deeds, if they ever existed, have for the most part been lost. In a few cases, pastures are registered as " assigned " in the Lands Department, and such registration will presumably be accepted by the Courts as sufficient proof of the title of the community. In the absence of registration, however, and because the Code provides for the existence of pastures which have not been assigned *ab antiquo*, it must be presumed that a given pasture belongs to the last-named class.

In the case of communities which number over 100 individuals, claims in defence of a communal right may be brought by " some " of the individuals concerned. In the case, however, of smaller communities, all the members must be joined as plaintiffs. This circumstance frequently operates as a denial of justice to the small community, since cases can be indefinitely delayed on pleas of non-joinder and mis-joinder.

Mewat Areas.—In addition to the kinds of land which we have hitherto discussed, we must notice the provisions of the Land Code which deal with Mewat, or dead lands. These are areas which have never been cultivated, and which the State could let out for cultivation, on the conditions laid down by the Code. Mewat is defined as the area of waste land which lies beyond the carry of the human voice when uttered from the nearest habitation. When the Code was framed no cadastral survey existed (it is now being undertaken for the first time) and the Mewat areas were regarded as possessing little value. It was, therefore, considered impracticable to set up boundary marks, especially as such marks would have to be frequently changed as the cultivated area extended. In these circumstances, it is difficult to see how the framers of the Code could have improved on their quaint definition. It has the effect of leaving at the edge of the Mewat lands a strip of rough pasture for the use of the adjoining village, and this effect was no doubt intended.

Since the Occupation, existing towns and villages have, in many cases, grown enormously, and many new colonies have been established. This has resulted in enlarging the inhabited areas, and, when those areas are in the neighbourhood of Mewat, of pushing back the limits of the latter. In this way the State is being deprived of considerable areas which have a rapidly increasing value. The process is clearly one which should be dealt with by legislation.

The provisions of the Land Code with regard to the cultivation of Mewat have been set aside since the Occupation by a special Ordin-

ance, which provides for the leasing of these lands instead of for their acquisition as ordinary Mirie, in the manner provided by the Land Code. The framers of the Ordinance do not seem to have noticed the danger of creating areas which pay cash rents side by side with ordinary titheable land. The leaseholder on a cash rental is not obliged to bring his crop to the official threshing-floor or to wait for assessment. The result is that he can create a private floor of his own and utilize it to enable neighbours to evade the tithe.

Provisional Laws.—As time went on, it was found that the Land Code has certain deficiencies. In particular, the provision for the issue of an Individual Title-deed to an individual for each holding made it impossible for corporate bodies which held Mirie land to obtain registration in the corporate name. Thus, each of the bodies in question was compelled to have its lands recorded in the name of some trusted person on its behalf. Litigation between the latter or his heirs and the corporation became common, the former asserting and the latter denying that the land was held free of trust. Accordingly, a provisional law was passed shortly before the war by which certain corporate bodies were permitted to register. The list has subsequently been extended.

Other provisional laws of the same period dealt with Partition and Mortgage and further modified the statutory inheritance of Mirie land. In the last-named respect, the most important alteration is that which enables female children to inherit equally with males. The original Code contains sundry restrictions on the uses to which Mirie land may be put. We have seen that mulk accretions might not be put on it except with the consent, express or implied, of the Land Department. The use of the soil for brick-making is similarly prohibited. In fact, the intention of the original Code was to limit the rights of the Mirie holder to the cultivation of the surface of the land. The provisional laws have swept all these restrictions away, and the Mirie holder may now utilize his land as he pleases subject to the condition that the tenure may not thereby be changed, and to the obligation to pay an equivalent for the tithe when the land is used for purposes which are not agricultural. These provisional laws appear to have formed part of a more ambitious scheme, which amounted to the replacement of the existing Land Code by a new Act. They are called provisional because they were treated as law before being confirmed by the Council in Constantinople.

The Rakaba. — No discussion of ownership in the Ottoman Empire is complete without some account of the Rakaba. The

term originally meant the ring which was riveted to the neck of a slave. In Moslem legal phraseology it means ultimate dominion or ownership. The Rakaba is that which resides in the Sultan in respect to Mirie lands. It is that which resides in the proprietor of mulk property. It is that which resides in the owner of a chattel. In the case of wakf property it resides in the Deity. In some respects it corresponds with the Legal Estate of English law, as it existed before Equitable Ownership came to be recognized. Moslem law regards the Rakaba as incapable of diminution or division, otherwise than by express contract. Of such contracts the most important in the matter of immoveable property are those of Lease and Mortgage. The idea that the Rakaba is, or ought to be, capable of diminution or division by claims of an equitable nature is foreign to Moslem law. This is well illustrated by the provision of the Mejelle which states that a contract of sale which is intended to take effect at a future time is invalid. The object of this provision is to avoid the creation of an interval during which the Rakaba becomes indeterminate and the dominion which it connotes incapable of being fully exercised. In general, it may be stated that the Sharia Law recognized the distinction between ownership of immoveable property and ownership of chattels only in so far as the physical nature of the thing owned compelled it to do so. Thus, a man can pawn his coat by the simple process of handing it across the counter, but he cannot hypothecate his land in the same way, because it is not susceptible of being so handled. Hence the Mejelle is compelled to make separate provision for the pawning of chattels and for the hypothecation of land. In respect of both kinds of property, however, the Rakaba is regarded as being of essentially the same nature.

This idea of ownership was responsible for the absolute manner in which the Sultan's ownership of his Mirie lands was regarded. Under this view of the law there could be only one owner, and the cultivator of Mirie land could possess no rights partaking of the nature of ownership. The legal position of the latter had to be such as to constitute no infringement on the Rakaba of the Sultan. Hence he could occupy no position other than that of a tenant at will, either in logic or in law.

This enables us to appreciate the enormous change made by the Land Code in the idea of State ownership. It forbade the Sultan to resume or enjoy his Mirie lands in any fashion, and limited his powers to the collection of the tithe and other dues leviable on them

by the new law. At the same time it conferred on the cultivator rights based on title-deeds which amounted in practice to rights of ownership. The rights of common and pasture, to which we have already referred, provided a further limitation to the Sultan's ownership in favour of cultivating communities.

It is important to note that the possession of the Rakaba does not exempt the holder from the payment of taxes other than the tithe. The tithe was and is regarded as a rent paid by an occupier to an owner. The ordinary taxes of a fixed amount payable in cash are not regarded in this light. In other words, they do not constitute an admission of tenancy. It follows that if the tithe is changed to a tax of this nature it will cease to be the mark and admission of absence of ownership. The forthcoming settlement is intended to introduce such a change. When it comes about the distinction between Mirie and ordinary mulk property will be whittled down to a special form of inheritance and to the prohibition of dedication.

This opens up the possibility of treating lands of all classes on the same basis in the matter of assessment to land revenue. For this we have to thank the genius and courage of the framers of the Land Code. The fact that their technical skill in drafting and arrangement suffers by comparison with the breadth of legal outlook and sound statesmanship which their work exhibits in so marked a degree detracts but little from its essential value not only to their generation but to ours.

THE HISTORICAL SCHOOL OF JURISPRUDENCE AND TRANSPLANTATIONS OF LAW.[1]

[*Contributed by* F. P. WALTON, ESQ.]

I HAVE lately been reading over again, after an interval of forty years or so, the short but famous work of Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*, in which that distinguished writer formulates most clearly the principles of the historical school of jurisprudence.

Savigny's pamphlet—for it is little more—coming out as it did in 1814 when Germany was in a fever of patriotism at being at last free from Napoleon, provoked a controversy which raged for many years.

In a sense this controversy is perpetual. Among lawyers there will always be a school which clings with passionate devotion to legal traditions, and a school which is more willing to reject rules of law, however venerable, in favour of rules which seem to them to be more in accordance with an ideal law. It is not very important whether they call this ideal law the law of nature, as they would have done in Savigny's time, or whether they say in simpler terms that they are prepared to cast away old laws and adopt new ones because the new ones appear to them to be more just.

Since Savigny wrote so much has happened in the legal world that it is interesting to look at his theory afresh, and to see how far it has stood the test of time.

Savigny's Theory.—Let me try to state the theory as simply as possible. In doing so I shall not confine myself to the *Vom Beruf*, but shall refer to passages in the *System des heutigen Römischenrechts*, in which Savigny reaffirmed his theory twenty-five years later. In the preface to the *System*, published in 1839, he says that he has taught his theory for forty years, and has nothing to retract. Savigny's theory is that the law of any country grows

[1] Address delivered at the meeting of the International Academy of Comparative Law at The Hague, August 1, 1927.

up naturally by customary usage and without legislation. It is a product of the peculiar genius of a particular people. It may be compared with a language. The law of a people, like their language, has an organic connexion with their peculiar being and character.

In its origin law does not depend either upon chance or upon a conscious exercise of will. It grows out of the general consciousness, as a plant grows from a seed. That this is so is clearly seen when we consider the early history of peoples. Far back in the dawn of history we find that every people has a law of its own, which, like its language, bears the stamp of its peculiar national genius. It is in the common consciousness of the people that the positive law resides, and it proceeds from that general spirit which animates all the members of a nation.

In arriving at this theory Savigny owed no doubt a good deal to Hugo. It was from Hugo that he borrowed the idea, to which he returns again and again, that law grows up like language gradually and unconsciously, and that, like language, it reflects the national mind. And it is reasonable to suppose that Savigny was influenced by the views of his great contemporary Hegel, who was teaching at that time that in all history we can trace the workings of a mysterious Spirit.

Customary Law.—There is something very fascinating about this conception of law as consisting of customs which grew up before the dawn of history, and have been handed down by tradition as the cherished heritage of the race. To Savigny they seemed almost a part of the blood and bone of a people. Just as a people clings desperately to its language and feels no oppression so bitter as that of being forced to speak an alien tongue, so, in Savigny's view, a people ought to hold on with tenacity to the laws which have come down to them from their remote ancestors. It is certain that a part of the law in all the countries of Western Europe is of this traditional kind. And when we begin to examine any rule which belongs to this old customary law we find generally, not only that it bears the marks of great antiquity, but also that the same rule, or one slightly different, exists among other peoples of kindred stocks.

Let me give one illustration.

By the law of Scotland until 1855, if a marriage was dissolved by the death of one of the spouses within a year and day after celebration, unless within the year and day a living child had

been born which had been heard to cry the provisions which the law made for a surviving spouse could not be claimed.[1]

Now, when we find this requirement that the marriage shall have continued for a year and a day in the *Très Ancienne Coutume de Bretagne* of the beginning of the fourteenth century, in the old laws of West Friesland, Westphalia and Lippe-Schaumburg, when we find the English Glanvill, in the twelfth century, saying that the child must be *clamantem et auditum intra quatuor parietes*,[2] and old German laws saying that the proof that the child was born alive is *wenn es die vier Wände beschrien hat*, which is exactly the four walls of Glanvill, we know that we are in the presence of a bit of very old law.[3] And we have a shrewd suspicion that all this points to an earlier stage in the history when it was customary to have a trial marriage, or *Probe-ehe*, for a year, which was dissolved if no child was born in that time.[4]

Origin of German Law.—Now, if all the German law were of this customary kind, we should have little difficulty in accepting Savigny's theory as a good account of its origin, though we might not agree in the practical conclusions which Savigny deduces from his theory.

But, most unfortunately for Savigny's theory, there was, besides this old *Gewohnheitsrecht*, a great deal of German law which had not grown up in this rather mysterious way.

Not only was there plenty of enacted law, but there was also the great body of law—the so-called modern Roman law, or *Pandektenlehre*—of which certainly it could not be said that it grew out of the German consciousness or that it reflected their peculiar national mind and character.

No one could know that better than Savigny, whose life was spent in teaching how the Roman law had found its way through many channels into the various laws of Europe in the Middle Ages, and in expounding the principles of that modern Roman law which was the common law of Germany.

And it is very interesting to see how he struggles to overcome this difficulty.

He says that while the law has its origin in the popular con-

[1] Fraser, *Husband and Wife*, vol. 2, 963; Walton, *Husband and Wife*, 2nd ed., 235.

[2] VII, 18, 3.

[3] See authorities in article by Brunner H.: *Die Geburt eines lebenden Kindes und das eheliche Vermögensrecht* in *Zeitschrift Savigny, Stiftung*, v. 16, 63 (G. A.).

[4] See Grimm, *Rechtsalterthümer*, i. 613.

sciousness, a point is soon reached in the history of a nation when a class of professional jurists arises. And when that happens the law begins to develop after a different fashion. Instead of the slow and unconscious growth of custom we have law introduced consciously by legal craftsmen.

Professors write books in which they argue with one another and lay down propositions of law, and judges decide cases, and, in so doing, formulate legal rules of general application. In course of time some, at least, of the propositions laid down in the books and in the judicial decisions come to be generally accepted. We have a new kind of customary law, distinct from that old *Gewohnheitsrecht*—those ancient customs of the tribe or the people of which the origins are lost in antiquity. To a partial extent this answer does meet the difficulty, but only to a partial extent.

We may admit what Savigny says, that when lawyer-made law comes into existence the growth of law proceeds in two separate ways. The customary law of the common people still develops itself in its own slow and silent way, but this is no longer the principal manner in which new law is formed. The main development is by changes introduced by the lawyers. And, so long as the lawyers draw their materials from native sources, it may be contended with plausibility that this lawyers' law also grows out of the special legal consciousness of the race, and bears the stamp of the national genius. This has been so in England. The law—nine-tenths of it at least—has been made by lawyers, but it smacks of the soil all the same.

But in the case of Germany the trouble is that the lawyers did not draw on native sources. They went back to the Roman law, and devoted all their energies to introduce a body of laws which had been evolved in a society profoundly different from that of Germany.

Savigny's theory does not grapple with the fatal point that in Germany this later stratum of law is of foreign origin. From the sixteenth century downwards there had been a continual conflict in Germany between Roman law and German law, a conflict in which the home-grown law had a hard struggle to survive at all. Broadly speaking, during that long period the part of the law which was in active development, including the whole law of obligations, was Roman law.

We all remember how that conflict came to a head in 1888, when the first draft of a new German Code was published with five

volumes of *Motive* by the Commission of which Windscheid was a prominent member.

After eight years of wrangling a compromise was reached. Much more old German law was retained than had been proposed by the first commission. Without going into details, it is enough to say that in the new Code the family law, the law of succession, the law of immoveable property, the law of partnership and some other less important matters are, speaking roughly, German and not Roman.

Savigny is arguing about German law and the point which I wish to make is that his arguments in favour of keeping inviolate laws which are the heritage of the race, and in which the national character finds its expression, as it does in language, lose much of their force when we face the facts. The truth of the matter is that a very large and important part of the German law did not grow out of the consciousness of the German people, and does not bear the marks of their national genius, but, on the other hand, it grew out of the consciousness of the Roman people, and bears the stamp of the Roman mind.

Codification.—Savigny's contention is that codification is highly dangerous because it checks the natural and unconscious growth of law. Instead of the law being changed by a spirit operating silently and almost imperceptibly, we have the violent and capricious act of a lawgiver. He quotes with approval the hard saying of Bacon that codification should not be undertaken except in an age which in civilization and knowledge surpasses that in which the laws were made which it is now proposed to codify (Aph. 64).

As for the French Code, which in Savigny's time had been adopted in Westphalia, Baden, etc., he considers it as a disease. "It broke into Germany and ate in further and further, like a cancer."

An Englishman reading Savigny's thesis may be pardoned for thinking that, as regards this theory, it was a misfortune for Savigny that he was a German and not an Englishman.

For his theory does explain, and explain very well, the origin and the growth of the English law. In it we have no disturbing foreign element. It is essentially a home-grown product. No doubt in the ecclesiastical and in the mercantile law there are traces of Roman law and of other foreign laws, but the foreign elements are slight in comparison with the bulk of the law, and they have, as a rule, been brought in imperceptibly by judicial decisions,

and only when they could be fitted into the framework of the law without disharmony.

And I think that the want of enthusiasm in England for codification of the law arises to a large extent from the same feeling as Savigny's, that codification might interfere with the natural growth of the law in the way in which it has developed for a thousand years or so.

I am far from suggesting that we share Savigny's horror of legislation. He speaks of the legislator as if he were a kind of wild beast breaking in and destroying out of mere caprice. In our eyes the business of the lawgiver is to make such laws as the people have shown that they want. Sometimes the legislator exceeds his mandate, or acts without a mandate; but if he does so, the day of reckoning soon comes. On the whole, both our statutes and our common law grow out of the popular consciousness.

Savigny's famous theory did not square at all well with the facts of German law, and his arguments altogether failed to prevent the making of codes, which has gone on merrily since his time.

Legal History.—But we owe to Savigny an enormous debt. It was from the impulse which he gave that the importance of legal history came to be recognized. It was Savigny who first made lawyers realize that to get a sound knowledge of law one must know its history, must have, as he said, "the confirmed habit of viewing every notion and every doctrine in its proper historical light." And he says rather sternly that "a mere slight and gentlemanlike knowledge"—*eine leichte vornehme Kenntniss*—will not do.

Any lawyer who can look back forty-five or fifty years must be struck by the advance in legal history.

Except for the works of Savigny and Maine, whose *Ancient Law* was published in 1861, the year of Savigny's death, where are the legal histories of the eighteenth and early nineteenth centuries, not to speak of those of an earlier period? How often are they disturbed in their repose in the libraries? Almost all the legal histories in use to-day have seen the light since I began the study of law.

For the history of English law there was then no Pollock and Maitland, no Jenks, no Vinogradoff, no Ames, no Holdsworth. In France there was no Esmein, no Viollet, no Glasson, no Brissaud. In Italy there was no Calisse, in Germany no Brunner, no Schroeder, no Hübner.

Shall we not say that the historical school is justified by its fruits? But since Savigny's time certain events have occurred of

an entirely novel character which would, I think, have shocked him profoundly.

Transplantation of a Legal System.—We have seen several cases in which a people possessing an ancient customary law, which had grown up ages ago out of their legal consciousness, has deliberately thrown overboard this heritage of the race, and has introduced at one blow a legal system entirely foreign.

This is, so far as I know, a new phenomenon in the legal world, It is not the case of a conqueror imposing his laws on a conquered people. Nor is it the case of one country copying a particular rule or a particular piece of legislation which has been found to work well in another place. This kind of legislative borrowing is much commoner than it used to be, but there is nothing shocking about it. Such laws as Workmen's Compensation Acts, for example, may be adopted by one country after another without dislocating the legal system.

The cases I have in mind are quite different. They are transplantations of a legal system, or of a large part of a legal system, from one country to another. Such an event would be surprising enough if between the two countries concerned there were close ties of blood, and if their history and development had been similar. In such a case the laws of the two countries would have grown out of legal consciousnesses, which had much in common. They would in all probability not differ from each other more widely than, let us say, the laws of the German States in the sixteenth century.

But in each of the cases to which I refer we see an oriental country with a system of law of great antiquity, and, moreover, a system of law which is closely bound up with the national religion, casting all, or a great part, of this old law away, and adopting the law of a Western people, far removed in race, religion, history and culture.

And yet this has happened in our time in Egypt, in Japan and in Turkey.

Egyptian Codes.—It is not necessary for my present purpose to refer to the complications of the legal system of Egypt due to the Capitulations. It is enough to say that when the Civil Code of the Native Tribunals was promulgated in 1883, in the time of Ismail Pasha, the Mohammedan law of property and of obligations was abandoned, and, speaking roughly, the French law was substituted. It is true that here and there fragments of the old Moham-

medan law are retained, sometimes in such a way that the two elements are imperfectly harmonized. But these are small matters. Speaking generally, the whole of these important branches of law is revolutionized.

But it is important to remember that these Egyptian Codes do not cover the personal law. Such matters as Marriage, Divorce and Minority are left out. And, as regards them, Mohammedans in Egypt are still governed by their religious law.

The law of property and obligations and some other matters which the new Code dealt with became French, mainly owing to the influence of Nubar Pasha the Khedive's chief adviser. The change was part of the general movement towards westernization, and was made more easy by the fact that French law was already applied in Egypt in the Mixed Courts in cases between Egyptians and foreigners. Notwithstanding this, one might have expected that the introduction of the French law to govern relations between the Egyptians themselves would have been highly unwelcome to people in many matters intensely conservative, who regarded their old law as interwoven with their religion. Some feeling of this kind there must have been, but, so far as I know, it soon died away. The Egyptians at the present time are, I think, as well content with their French law as if it had grown out of their own legal consciousness.

Civil Code of Japan.—Another notable instance of transplantation is the Civil Code of Japan of 1898. I believe that the Japanese had paid hardly any attention to European laws until about 1870. When the westernizing tendency began to prevail, they turned to study first the French, and afterwards the German and the English laws. The Civil Code of 1898 is singularly eclectic; more so, I suppose, than any other civil code. Its technical terms are mainly translated from the German, and the Code as a whole bears many marks of German influence. But it borrows freely from the legislation of Belgium, Holland, Switzerland, England and the United States. In Japan the old traditional family law is in the main preserved, though less completely than in Egypt. We find in the Code rules about the rights and duties of the Head of a House which remind us strongly of those of a Roman *paterfamilias* in early times, except that in Japan a woman may be the Head of a House—rules which bear the stamp of immemorial antiquity. And, side by side with this ancient law, we have rules taken from the modern legislation of the most progressive countries of western civilization.

Turkish Civil Code.—The third instance of transplantation is still more surprising, because it extends to the family law.

Turkey had during the latter part of the nineteenth century promulgated codes mainly based on those of France, but, until quite recently, the Mohammedan family law was retained. Now it has gone too. The new Turkish Civil Code and Code of Obligations, which have just come into force, are nearly identical with the Swiss Codes, except as regards the articles on commercial partnerships. In proposing the new Civil Code to the Assembly, Mahmud Essad Bey, Minister of Justice, said—I quote from *The Times* of February 19, 1926—that the most important part of the Code concerned social organization, and in it the two sexes were treated on a basis of equality. In his opinion the saddest figure in Turkish history, and the most worthy of compassion, was that of the Turkish woman, who had hitherto been treated as a slave, and who would now take the place to which she had a right. By giving the Turkish mother her proper position the new law would give fresh vigour and consistency to Turkish society. The past thirteen centuries would be swept away, a new dawn would arise, and a fruitful era of civilization begin.

Now, however much we may agree that it was desirable to improve the legal status of women in Turkey, this is surely another blow to those who teach the sanctity of customary law. The Mohammedan law had been for centuries regarded with peculiar veneration. It was the Sacred Law, and yet the movement of the age has been too strong for it.

We may venture to doubt whether thirteen centuries can be swept away in this rather summary manner, or whether the Anatolian peasant completely realizes that old things are passed away, and all things are become new.

But, after making all reservations, it is startling enough that such a legislative change should have been possible at all.

Conclusion.—Paradoxical as it sounds, it is probably true that in such matters the Western countries are more conservative than the East.

The reason of course is that in Eastern countries the leaders of opinion have been captured by the Western spirit. Fired by the ambition of placing their countries on a level with the progressive countries of Europe, they have been able to make tremendous legislative changes and to impose them upon the passive and inarticulate masses.

Legislation of this heroic character is hardly imaginable in such countries as France or England, where the lawyers whose support is essential in legal reform exhibit as a rule extreme conservatism.

But, all the same, if we look at Savigny's theory in the light of what has happened since his time, we are driven to the conclusion that he overestimates the importance of customary law, and the danger of uprooting it. I think it is quite conceivable that in Egypt, in Japan and in Turkey, the foreign law which has been so violently introduced will serve the needs of the people just as well as if it had grown out of their legal consciousness.

Savigny's explanation of the origin of customary law has not lost its interest or value, but the conclusions of a practical kind which he seeks to draw cannot be accepted without much reserve.

He complained that in his day there was no admiration for the past, and that the whole of Europe was actuated by "a blind rage for improvement."

If he were living to-day he would not, I fancy, see much that would console him.

TOWN-PLANNING LEGISLATION IN NEW ZEALAND.

[*Contributed by* James Christie, Esq., *Parliamentary Law Draftsman.*]

In New Zealand town-planning has long been popularly regarded as a more or less idealistic scheme, having for its main purpose the satisfaction of the æsthetic senses, without regard to utilitarian requirements. People have thought of it in terms only of parks and open spaces, and of avenues of trees, with here and there a fountain or a statue. It has at last come down to earth, and people are now learning that the name "town-planning" is properly descriptive of its subject-matter; that use and beauty go hand in hand, and that a plan is as essential for the satisfactory and harmonious development of a city as for the proper building of a house.

This change in the popular point of view has been reflected in the attitude of our legislators, and a Town-planning Act has recently been passed, and came into force on January 1, 1927. Many popular misconceptions still persist as to the true nature and function of a town-planning scheme as required by the Act. Some people seem to think that the effect of the Act will be miraculously to solve particular local problems. A question, for example, arises as to whether two parallel streets with a dividing line of unsightly shrubs should be merged to form a single arterial highway. It is asked why the matter cannot be allowed to stand over until the Town-planning Act comes into operation; as if the coming into force of the Act would itself solve the problem. A town-planning scheme will of course be concerned with such problems, but the Act is not a treatise on town-planning, nor does it formulate even the most elementary of town-planning principles.

Town-planning Schemes.—The immediate result of the Act is to impose on every Borough Council in New Zealand in whose district there is a population of 1,000 or more, a statutory obligation to prepare a town-planning scheme. There are already upwards of 100 such local authorities, with populations ranging from just over

1,000 to upwards of 100,000 in the case of the principal cities, and the number is being steadily increased with the increasing population of semi-rural areas. The preparation of over 100 town-planning schemes in a country in which there is a relatively small number of men trained in the principles of modern town-planning is a somewhat tremendous task, for the accomplishment of which the Act allows a period of three years. The preliminary work is to be carried out in accordance with regulations to be made under the Act, and will be done under the constant supervision and guidance of the Director of Town-planning. To this important public office the Government has already made an appointment in the person of Mr. Reginald B. Hammond, A.M.Z.I.A., A.M.T.P.I.[1] A Town-planning Board has also been constituted consisting of (*a*) representatives of the related professions of architecture, engineering and surveying: (*b*) representatives of local government in municipalities and in rural areas; (*c*) the officers of the Public Service for the time being holding office as Surveyor-General, Engineer-in-Chief and Government Architect; (*d*) two persons to be appointed otherwise than as representatives of particular interests.

Regional Planning Schemes.—Associated with town-planning schemes proper are complementary schemes for rural areas, referred to in the Act as "regional planning schemes." The Act begins with a statement in general terms of the purposes of a town-planning scheme and of a regional planning scheme. S. 3 is in the following words:

> Every town-planning scheme shall have for its general purpose the development of the city or borough to which it relates (including, where necessary, the reconstruction of any area therein that has been already subdivided and built on) in such a way as will most effectively tend to promote its healthfulness, amenity, convenience and advancement.
>
> (2) Every regional planning scheme shall have in relation to the rural area to which it relates the same general purposes as a town-planning scheme in relation to a city or borough, but, save in cases where exceptional conditions prevail, every regional planning scheme shall primarily be prepared and dealt with in relation to and as complementary of the town-planning scheme of any city or borough in the vicinity of the rural area.

[1] Mr. Hammond was for three years a student under Professor Adshead in the Department of Town-planning at London University College. Later, he was on the staff of the London County Council, assisting with the Beacontree Town-planning scheme; and was also associated with Mr. Herbert Baker in the drawing of plans for the new city of Delhi. His present appointment is limited to a term of twelve months, but this will doubtless be extended.

Preparation of Scheme.—The preparation of a town-planning scheme is primarily the duty of the Council of the borough to which the scheme relates, acting through its own servants and advisers. When a scheme has been prepared the Act requires its submission to the Town-planning Board for provisional approval. When provisionally approved, it is to be advertised, and made available for public inspection. Ratepayers in respect of property situated in a district affected by a scheme have a statutory right of objection; other persons (as, for example, representatives of societies interested in the amenities of a scheme) have a right conferred by regulation to make "representations" as distinguished from "objections." All such objections and representations are first considered and reported on by the local authority, but are required to be submitted to and finally dealt with by the Town-planning Board.

Approval of Scheme.—A scheme is made operative by the formal approval of the Town-planning Board. When a scheme has been so finally approved, the Act requires that all future works done within the borough must conform to its requirements, and, in respect of areas that have been already built upon, no alterations are to be made or new works undertaken that will tend to delay the final bringing of the whole area of the borough into conformity with the scheme. In the meantime, however, there is no obligation to pull down and destroy. The Act has been content to say that old faults must not be repeated and that future development must be on right lines.

Subject-matters dealt with.—The main subject-matters to which a town-planning scheme as contemplated by the Act relates are set out in a Schedule thereto. They comprise the laying out of streets; the fixing of building lines; the density of buildings; the reservation of playing-areas, parks, recreation-grounds, and open spaces generally; systems of lighting, water-supply, drainage and sewerage; the preservation of objects of historical interest and natural beauty; and finally, though looming large in importance, what, in town-planning parlance, is known as "zoning"—that is to say, the definition of areas to be used exclusively or principally for specified purposes or classes of purposes.

Regional Plans.—In addition to town-planning proper, provision is made, as stated above, for what is called "regional planning." Regional planning relates to rural areas outside the boundaries of a municipality. A regional plan is primarily required, not for the development of the area to which it relates, but in its relation to

the town-plan of an adjacent borough. The statute does not impose on any local authority an obligation to prepare a regional plan, but the Governor-General may call upon the local governing authority to prepare a regional plan for a defined area within its district if it appears that such a plan is rendered necessary by the requirements of a town-planning scheme.

Compensation.—The question of compensation is, of course, of supreme importance in relation to the practicability of any town planning scheme. As a set off against what might otherwise prove a prohibitive cost, the Act contains certain "betterment" provisions. "Betterment" in this connexion is defined as being such increase in the value of any rateable property as is attributable to the approval of a town or regional planning scheme, or to the carrying-out of any work authorized by the scheme. Special provisions are made for the assessment of that increase of value within a limited time after the final approval of the scheme or after the carrying-out of any work undertaken pursuant to the scheme, as the case may be; one half of the amount of any "betterment" increase is declared to constitute a debt due by the owner of the property to the local authority. The local authority may allow up to twenty years for the payment of such betterment by equal instalments, and in the meantime any outstanding amount bears interest at 4½ per cent. per annum. The attempt to recover betterment is more or less experimental, and no doubt many stiles must be crossed before a perfect system is evolved.

Administration. — The satisfactory administration of the Act will doubtless present many difficulties. It is unlikely that local authorities or their professional advisers will always readily accept, in matters of local interest, the judgment of an experienced town-planner or of a Town-planning Board in preference to their own. But a considerable advance has been made if the initial obligation to prepare a scheme for future development is faithfully carried out. A plan having been prepared, reasonable men can normally be trusted to adhere to it.

PRELIMINARY STEPS TOWARDS A NEW CIVIL CODE FOR THE CZECHOSLOVAK REPUBLIC.

[*Contributed by* Dr. Jan Srb, *Ministry of Justice, Czechoslovakia.*]

Dualism of Legal System.—The need of abolishing the dualism existing in the legal system of the Czechoslovak Republic was particularly urgent in regard to the civil code, for the difference between the two parts of the new State was much more profound in that branch of law than in any other. This difference lies not so much in a different working of various institutions as in the fact that throughout the territories formerly belonging to Austria citizen rights (*Bürgerrechte*) were contained in a single code—in the Civil Code (*bürgerliches Gesetzbuch*) of 1811, amended and supplemented by three amendments (*Novellen*) of 1914, 1915 and 1916, whereas in the territories that were formerly part of Hungary no such single codification existed. It is true that during the absolutist era of the former Monarchy the Austrian Civil Code was, by an imperial decree November 29, 1853, applied to Hungary as from January 1, 1853, but on the restoration to Hungary of her constitutional rights a special conference, called the "Judexcurial Conference," resolved in the year 1861 to leave in force only those provisions of the Austrian Civil Code which dealt with the registered acquisition and alienation of real property, restoring at the same time the old Hungarian law which for the most part was common law. The fact that the Austrian Civil Code had been in force in Hungary for a number of years did not of course fail to leave some trace upon the Hungarian common law, numerous provisions of the Austrian Code having been absorbed into the common law. Later only one or two sections of the common law were adjusted by special legislation—as for instance by the Matrimony Act, the Guardian and Trustee Act, the Probate Act and numerous measures adjusting certain working conditions, etc. —and in spite of some preparatory efforts no uniform codification of Hungarian law was accomplished.

On the establishment of the Czechoslovak Republic the political

frontier between Bohemia, Moravia and Silesia on the one hand, and Slovakia and Carpathian Ruthenia on the other, ceased to exist, and intercourse between the two areas became very brisk, with the result that numerous cases of conflict ensued between the two legal systems similar to the conflicts that call for settlement under the rules of private international law. Owing to the complicated state of existing legal conditions, the solution of such cases of collision between different legal systems valid in one and the same State is no easy matter. Several countries that found themselves in a situation similar to that in which the Czechoslovak Republic found itself saw themselves compelled to issue special regulations for the settlement of such cases—as, for example, the French enactment of July 24, 1921 (*lois prevenant et réglant les conflits entre la loi française et la loi locale d'Alsace et Lorraine en matière de droit privé*) and the Polish law of August 2, 1926.

The fact that the interprovincial law within the Czechoslovak Republic has not hitherto been adjusted by legislation must be attributed in part to the circumstance that in practice an analogical application of the principles of private international law has led to generally satisfactory results, in part to the fact that special standards of interprovincial law would soon be rendered superfluous by the speedy unification of the civil codes. Experience, it is true, has shown that the period within which the new Civil Code will come into operation will not be so short as was hoped at the outset. To-day, however, now that the preparatory work on the new Civil Code is in full swing, a special Act of Parliament dealing with interprovincial law does not appear to be urgent.

Unification of the Civil Code.—When, at the beginning of 1919, the Czechoslovak Ministry of Justice began to occupy itself with the problem of the unification of the civil law, it was thought that the unification could most easily be accomplished by extending the application of the Austrian Civil Code of 1811, with the later legislative amendments, to Slovakia and Carpathian Ruthenia. With this object in view a Czechoslovak text of the Code, as in force, was drafted, only those provisions being omitted or amended which were not in accordance with the democratic spirit of the new State, or which had been superseded by the legislation passed under the Republic.

The plan in question was fully explicable by the conditions prevailing at the period when it was first mooted. In the year 1919 the Legislature and the Government authorities had to devote

their energies largely to liquidating the unhappy consequences of the World War, and to solving as speedily as possible the pressing economic and social problems. There was neither the time nor the necessary tranquillity for undertaking a measure of such far-reaching reform. If unification was to be attained without loss of time there seemed no other course open than to adopt in substance what was available.

On the advice of legal experts, however, this plan was abandoned. It was recognized that a measure by which the civil law of the Czechoslovak Republic was to be adjusted for many years to come ought to be well weighed beforehand in detail and drafted with the utmost care in order to meet requirements in every direction. Careful preparation of the measure meant, of course, a certain postponement of unification, but the delay would be balanced by an increased internal value of the new Code.

The idea of simply extending the application of the Austrian Civil Code to a part of the Republic where it had hitherto not applied was put into effect on the subsequent incorporation of Hlučinsko. This territory, which was incorporated in the Czechoslovak Republic under the terms of the Treaty of Versailles (it had belonged to Germany), was added to the administrative province of Silesia, and the Austrian Civil Code, with the other laws in force in the former Austrian territories, was put in force in Hlučinsko by a Government decree of March 11, 1920, issued in virtue of the Incorporation Act of January 20 of that year.

Appointment of Commission.—The legal experts recommended that, in connexion with the reform of the Civil Code, practical lawyers should be consulted—judges, advocates and notaries.

The Ministry of Justice, therefore, appointed a commission composed of university professors of civil law and procedure, and of representatives of the Bench, Bar and the notarial profession, and submitted to this commission the question of what course was the best to adopt in carrying through the proposed reform of the civil law.

The commission was in particular called upon to determine the fundamental character of the new Code, and to decide whether one of the civil codes of a foreign country should not be taken as model for the new Code—for instance, the Swiss Civil Code.

The commission unanimously decided that the Austrian Civil Code of 1811, together with the amendments (*Novellen*) made during the War should be taken as the basis of the reform.

This decision, which was in complete harmony with the standpoint of the Ministry of Justice, was arrived at by the commission on the consideration that it was essential for the new Code to find a soil previously prepared for its reception, and a suitable continuity with the previous legal development in the sphere of civil law within the territories now forming the Czechoslovak Republic. Regarded from this angle the Austrian Civil Code, which in one area of the Republic was in full force, in another area was being applied at least in part as statutory law, and in part as a backing for the common law, was the one suitable code to take.

The decision of the commission was not uninfluenced by the consideration that, in interpreting and applying a Code that followed the lines of the Austrian Civil Code, it would be possible to make very considerable use of the rich jurisprudence and literature which, in the course of years, had grown up round the Austrian Civil Code, and in the growth of which leading jurists of Czechoslovak nationality had also had their share.

The reasons here indicated would, in spite of their great weight, scarcely have sufficed to produce the decision in question if the commission had not been conscious that the Austrian Civil Code was, by virtue of its intrinsic value, fully worthy of being adopted as the basis of the future Code of the Czechoslovak Republic. Despite its being more than a century old, this Code in its main outlines is still remarkably serviceable, and its comprehensiveness, clarity and brevity, as well as the cautious formulation of legal rules enabling its provisions to be still used under substantially changed conditions, deserve the utmost praise.

The Austrian Civil Code contains, of course, provisions that are really obsolete and anachronistic; but these provisions may be removed or replaced by more suitable ones without unduly disturbing the remaining provisions.

Starting from these considerations the commission fixed upon the following lines for the reform of the Civil Code: Only the most essential alterations, in so far as they are demanded by the changed economic and social conditions, or by the necessity of harmony with the other laws of the Czechoslovak Republic, shall be made in the Civil Code; obsolete provisions shall be left out, and the Code completed by an adjustment of those questions of which contemporary conditions demand legal settlement, or which are adjusted by special enactments closely connected with the Civil Code. Due

consideration was, of course, also to be given to the law in force in Slovakia and in Carpathian Ruthenia.

Appointment and Work of Sub-committees.—The preliminary work on the reform of the Civil Code was entrusted by the commission to five sub-committees, *rapporteurs* for which were appointed in the person of five university professors, Dr. Kafka, Dr. Krčmar, Dr. Stieber, Dr. Svoboda and Dr. Weiss. In addition to them, each sub-committee contained two representatives of the Bench, Bar and the notaries. The conduct of the deliberations and work was taken over by the Ministry of Justice itself, and the deliberations were also attended by representatives of the Ministry of Unification, a body created by an enactment of July 22, 1919, for the purpose of making law and administration uniform throughout the entire territory of the Czechoslovak Republic.

The sub-committees commenced their work at the close of the year 1920, and completed it in 1923. Their proposals, accompanied by extensive explanatory reports, were published in the press in order to give the public an opportunity of acquainting themselves with their terms and subjecting them to criticism. In 1925 a German translation was issued.

A special commission of practising Slovak lawyers studied the proposals of the sub-committees, from the point of view of the law in force within the territories formerly belonging to Hungary, and with regard to the special needs of that area.

The reports of the sub-committees represent the first stage of the civil law reform. The sub-committees worked separately, but on the lines, of course, already referred to. These lines—as was inevitable—were very elastic, and some of the sub-committees allowed themselves ample latitude, and did not shrink from reforms, while others kept as closely as possible to the Code in force. The results of the work of the sub-committees are not therefore homogeneous, quite apart from the fact that on several common points the individual sub-committees took up a somewhat divergent standpoint.

To settle these differences and to prepare a uniform text of the new Code is the task of a Supervising Commission which the Ministry of Justice has appointed, and which is composed of the *rapporteurs* of the sub-committees and two representatives of the Slovak commission. The supervising commission must, in its deliberations, take account of the judgments arrived at in the preliminary work. The final draft as passed by the supervising commission will be

submitted to the Government for approval, and then laid before the Houses of Parliament.

The supervising commission began its activities in 1926. Following the lines of the Civil Code which in principle is to be preserved without change, the commission has up to now, apart from the introductory provisions, including private international law, and provisions touching personal rights—dealt with matrimonial law, and is at present dealing with the legal relations between parents and children. The results of the commission's labours have not yet been published.

Changes made by New Code.—From what has already been said above as to the leading principles of reform of civil law in the Czechoslovak Republic, it is clear that the changes by which the new Code will differ from that which was in force in the area previously subject to former Austrian law are not to affect the character of the Code as a whole, but only its details. In a brief article it is of course impossible to make mention of all these details. Sometimes the sub-committee has only reformulated the rules so as to give clearer expression to an idea which was not to be read from the existing Code without some difficulty; sometimes a new mode of expression is intended to give a sounder support to the established procedure, and so the text has been adjusted in accordance with general practice. In some places, however, really new provisions have been introduced, and the outstanding ones will now be discussed. The opinion also of the supervising commission will be given on those questions which it has already dealt with.

In the course of their activities both the sub-committees and the supervising commission have consulted the civil codes of other countries—especially, of course, those whose system of laws is related to that of the Republic. In particular the Swiss Civil Code, which in its brevity, clarity and conciseness bears so much resemblance to the Code of 1811, has exercised an influence on the formulation of many of the provisions. It would be an interesting task to trace the extent to which the individual provisions in the new Code are a reflex of foreign models, but such an inquiry would go beyond the scope of this article.

Provisions on Private International Law.—The most extensive addition made by the proposals of the sub-committees is the series of provisions relating to questions of private international law. The existing rules on this difficult matter, although progressive enough at the time of their creation, are now incomplete, and not

always appropriate, in view of the increased intensity of international legal relations and of the conclusions reached by the modern theory of private international law. The sub-committee which dealt with this question did not follow the model of the Civil Code of the German Reich which places conflict of laws among the introductory law, but embodies international private law directly in the Code itself.

As regards content, the proposed rules of private international law keep to the draft which was prepared in 1913 by the Austrian Ministry of Justice, with the assistance of legal experts, among whom was Dr. Krčmar, the *rapporteur* of the sub-committee dealing with this topic. In Austria the draft in question never became law. Not only is the Czechoslovak draft based upon it, but it also forms the basis of the Polish enactment of August 2, 1926, on private international law.

The draft made by the sub-committee devotes in all 52 paragraphs to the subject of conflict of laws. As regards the status of the person, the law of the State of which the person in question is subject is declared decisive (*lex patriæ*), a provision which is in accord with the tendency of the majority of systems of law in force in the different countries on the European continent. The capacity to exercise legal rights is attached to the right of domicile, as is also the question of family rights, presumption of death, and hereditary succession even in the case of real property.

Possession and real rights in respect of immoveables follow the *lex rei sitæ*. In the case of immoveables the law of the place where the personal property was situated at the moment when the event took place which forms the basis of the creation or extinction of the right is decisive. Adverse possession (prescriptive right) is regulated, in principle, according to the law of the place where the subject of the prescription was situated at the moment when prescription began.

Procedure is regulated by the rules of procedure prescribed by the law applicable to the case, but it is sufficient if the form of procedure is observed as prescribed by the law of the place in which action is taken. Marriage rites are regulated by the law of the place where the marriage is solemnized, or, subsidiarily, by the law of the country of which the spouses are subjects. The form of last wills and testaments is regulated by the law of the country of which the testator is subject, or alternatively by the law of the place where the will was executed. In cases of rules of public

order, the parties may elect the law which is to regulate their mutual relations. If there is no such agreement made, contracts touching real property are dealt with under the law of the place where the property is situated; contracts made in the open market or on the Bourse, by the law of the place where the market or Bourse is situated; contracts made in trade or commercial transactions by the law of the place in which the business of the seller is situated; insurance contracts by the law of the place where the insurance company or its agency has its headquarters, and so on. In the absence of any special feature determining the law to be applied, contracts between parties that are present are dealt with under the law of the place where they were concluded, and in the case of absent parties by the law of the place of fulfilment.

The draft submitted by the sub-committee allowed of the so-called *renvoi*, and contains a reservation to the effect that rules of foreign law shall not be allowed to apply where they are in disharmony with Czechoslovak laws which have the character of *ordre public*.

The proposed provisions are not to apply if other regulations have been fixed by inter-State treaty.

The supervising commission made comparatively little change in the actual substance of the sub-committee's proposals. It restricted the power of electing the law to be applied by laying down that parties may only elect such foreign law as has some outstanding connexion with the legal conditions in dispute, such connexion being provided, for example, by the place where the contract was concluded, by the place of fulfilment, by the place where the subject of the contract is situated, and the like. As regards obligations, the supervising commission made no change in the principles proposed for contracts regarding immoveables and for contracts made on the Bourse or in the market, while for all other kinds of obligations it fixed upon the general formula that these obligations are to be regulated by laws answering to a reasonable adjustment of the legal relations in question. For example, except where serious objections can be brought forward, the law to be applied in cases of sales and of contracts for work concluded in the course of commerce or trade is the law of the place where the business of the seller or the party undertaking the work is situated; in the case of insurance contracts, the law of the place where the insurance company or its agency has its headquarters; in the case of contracts with doctors, lawyers, notaries, etc., the

law of the place where these persons have their professional offices or dwelling-places.

The provision relating to *renvoi* has been deleted by the supervising commission.

In the Code itself have been left only those provisions of a purely material legal character, while those relating to procedure (for example to probate and trusteeship) have been left to be included in the enactment which will adjust such procedure, or in the Introductory Law to the Civil Code.

Marriage Laws.—In the section relating to Marriage Laws a new point is the provision that marriage is invalid by reason of error touching the personal qualities of the other spouse, if the objections are so serious that, had they been known in time, the marriage would not have taken place, and if it would be unjust in the circumstances to require a continuation of cohabitation as man and wife. Further, it is laid down that the marriage of a person who has been legally declared dead is nullified by subsequent marriage of the other spouse, even if it subsequently comes to light that the person presumed dead is still alive. In such case, however, the second marriage may be brought to an end by divorce. Finally the Code itself will include provisions regarding marriage rights and divorce hitherto contained in the Act of May 22, 1922. The sub-committee left the grounds of divorce in substance unchanged, though it emphasized in more precise terms than hitherto the fact that the general ground for divorce is the failure of the marriage, that is, a state of affairs in which the parties to the marriage cannot justly be expected to continue in marital relations.[1] Other grounds of divorce, such as adultery, conviction for felony, cruelty, etc., are only special cases of failure.

Among the changes made by the supervising committee mention may be made of the fact that separation may be converted into divorce on the petition of one party, if the separation has been in force for at least two years; that the spouse by whose fault the separation was caused can, however, only make the petition if the other spouse refuses to resume cohabitation.

Detailed consideration has been given to the subject of the law of married persons' property. The Civil Code in force up to the present does not provide for community of property between man and wife, although it allows of such community based upon contract. On the other hand—following Roman law—the presumption is

[1] Cf. the provisions of Art. 142 of the Swiss Civil Code.

expressed that in doubtful cases property acquired during marriage is the property of the husband. Against this there prevails, *ex lege* at least in certain sections of the population, according to Hungarian law, the so-called community of acquired property—that is, each spouse retains the property he or she had on the contraction of the marriage, and what he or she acquires by gift, inheritance, etc., while the property acquired by either of the parties by their own work and effort becomes the common property of both. The sub-committee hesitated to adopt this system as being too much opposed to the established ideas of the majority of the Czechoslovak population. It deleted, however, the presumption mentioned above to the effect that property acquired during the subsistence of the marriage belongs, in cases of doubt, to the husband, although several other Civil Codes (for example, the German Code, par. 1362, and the Swiss Civil Cide, Art. 196) retain this presumption in a somewhat restricted form.

The supervising commission went a step further. It did not introduce community of property as obligatory, but laid down the presumption that everything acquired during the marriage—unless proved otherwise—is to be regarded as the common property of the two spouses—and that in equal proportions, unless the Court should fix the proportions otherwise according to the circumstances in particular concrete cases.

In relations between parents and children the supervising commission introduced a more far-reaching change in providing—on the model of the German and Swiss Codes—that parental power shall be substituted for paternal power, and that this parental power shall be exercised by the father and mother jointly. Certain powers, however, issuing from this species of authority are reserved for the father alone, or he is given at least a deciding influence.

The sub-committee has, it is true, improved the position of illegitimate children in detail, but it has retained the principle that the illegitimate child has no other claim on its father (that is, the man who had intercourse with its mother at the critical period) than for suitable sustenance and provision. But the sub-committee itself recommended that the supervising commission should further improve the position of illegitimate children by providing that some such children (as those whose illegitimate father recognizes them, or those whose paternity is established beyond dispute) should enjoy the same rights in relation to the father as legitimate children. Children whose mother at the critical period has had intercourse

with more than one man would not enjoy such rights, but would, on the other hand, have a claim for an affiliation order against all such men. This suggestion made by the sub-committee embodies some ideas to be found in the legislation of Denmark and Norway, and is at this moment under consideration by the supervising commission. From the discussions which have proceeded on this point up to now it is certain that the principles of the suggestion will be incorporated in the Code.

Real Property.—In the real property section there is an interesting readjustment of "building right," that is, the right to erect a building on or under the surface of another's property. In former Austria this right was dealt with by a law of April 26, 1912. The sub-committee has considerably extended the provisions of this enactment and deleted many hard conditions, having been prompted by a desire to enable this building right to be utilized in its new form for the purpose of overcoming the building and housing crisis which after the War affected the Czechoslovak Republic as it did many other countries, and made necessary a number of special legislative measures, such as the Tenants' Protection and Housing Acts.

Special forms are also proposed for pledges of collective goods, concerns working for profit and other undertakings. The act of pledging takes place in the form of an entry into a register that will be kept in the manner of the Land Registers. In drafting the proposals regard was paid in particular to the French law of March 17, 1909 (*Loi relative à la vente et au nantissement des fonds de commerce*). The law of pledges thus adjusted (registered pledges) is to apply to all the property of the debtor which belongs to the pledged undertaking as well as to everything which appertains to the regular working of the concern. On the other hand everything which, in the regular course of working, leaves the undertaking, is not included in the pledged matter.

In drafting the law of mortgage of immoveables the importance of the so-called "ownership mortgages" (mortgages in the disposition of the owner) has been extended. The owner of real property has the right, when the secured claim has been duly settled, of transferring the mortgage (that is, the registration of it), either at once or at any later date, to cover a new mortgage loan.

Rights of Succession.—In regard to rights of succession a change has been made in the form of wills. In the case of a holograph will it is required that the testator shall with his own hand add the name of the place, the day, month and year when the will was

written. A will written by a person other than the testator himself (allograph will) must be signed in the presence of three witnesses, all present at the same time.

The succession rights of a widow have been extended by giving her an inalienable right to a life interest in half the estate until her remarriage, and in any case she has a right to suitable provision out of the income of the estate, if she has no other source of such provision. A widower has no claim to half of his late wife's estate, but he has, for the period of his widowhood, a right to suitable provision if he is not otherwise provided for.

Law of Contracts.—In the Law of Contracts an interesting novelty is the provision regarding loans—a provision prompted by the experience gained during the post-War economic crises, when the currencies of several countries completely collapsed.

The provisions touching labour agreements and contracts of hiring and letting have been in many directions adapted to the changed social conditions, and a number of principles have been incorporated which have hitherto found expression only in special statute law. This applies, for instance, in the sphere of labour laws, to a recognition of the binding character of collective agreements.

The duty of giving compensation for damage rests in principle on culpability, but has been extended to cases of objective guarantee (liability for consequences). Thus, for example, the person who carries on a trade on a large scale—as in the case of a factory, navigation, a mine or a quarry, and employs steam, electricity or other like element is liable for actual damage caused by the working of the undertaking unless he can prove that the damage was caused by unavoidable accident, by the fault of the person suffering the damage, or by that of persons for whom the owner of the undertaking is not responsible. If the undertaking is not one that is conducted on a large scale the owner is freed from liability on proof that in carrying on the concern he has observed all the precautions customary in the trade or business or prescribed by special regulations.

In some cases compensation is claimable for damages other than material injury. Thus, for example, a woman who has been seduced under promise of marriage (or if the seduction is a criminal offence) may claim suitable damages for her loss of reputation.

The draft drawn up by the sub-committee also deals with the question of the liability of the State or other public bodies for

damage caused to a person by an official or employee in the course of his duties or work. An adjustment of this matter had already been promised by par. 92 of the Constitutional Charter of the Republic passed on February 29, 1920. Preliminary negotiations with the other Government departments have shown, however, that it will probably be found impossible to deal with this matter satisfactorily within the scope of the Civil Code, and that a separate enactment will be necessary.

Confirmation of Obligations.—Finally, two new features should be mentioned, one touching the confirmation of obligations, and the other the extinction of contracts.

The sub-committee's draft expressly admits the so-called " security transfer," that is, a legal transaction in which the debtor, in order to give the creditor security for the performance of his obligations, transfers to the creditor certain objects in his ownership. The validity of such a security transfer depends, of course, on whether it does not circumvent the law on some other matter of security. In bankruptcy and other insolvency procedure creditors who are in possession of such " security transfers " rank with other secured creditors.

Extinction of Contract.—The other innovation is one that has been evoked by the experiences of the War-time and post-War period. Owing to the exchange vacillations and the rise and fall of prices of raw materials and manufactures it frequently happened that the fulfilment of a contract was due at a moment when the economic conditions had changed so substantially that the parties to the contract could not reasonably have foreseen the change. The courts have not hesitated, on numerous occasions, to recognize that in such cases the debtor is not obliged to fulfil the contract. The sub-committee dealing with this question was disinclined to leave the courts without some measure of support in law, and therefore included in the Code a provision to the effect that if, after the conclusion of a contract, the economic conditions changed in an unforeseen manner to such an extent that the exact fulfilment of the contract would menace the economic standing of either party, the court may remove the hardship of the contract, either by annulling it or by readjusting the financial obligations issuing from it.

Conclusion.—By a whole series of further amendments and new provisions which it is impossible to deal with here, the sub-committee has endeavoured to produce a Code that will meet the needs

of the present day. In the greater part of the criticisms that have been passed on the draft proposals it has been admitted that the results of the labours so far have been such as to arouse confidence that the new Code will fulfil the hopes placed upon it. At the same time there are, of course, not wanting critics who regard some of the proposed changes as too far-reaching, and sometimes indeed as serious innovations.

The supervising commission is faced with the duty of carefully considering these criticisms and of applying such suggestions as may be deemed justified. To study all the criticisms and suggestions put forward naturally takes time, so that it is, as yet, impossible to say with any certainty when the work of the supervising commission will be concluded, and the draft of the new Civil Code submitted to the Government and to Parliament.

ENGLISH JUDGMENTS *IN PERSONAM* AND *IN REM* IN GERMANY.[1]

[*Contributed by* Dr. Jur. et Rer. Pol. Rudolf Kahn.]

Requirements of German Law in Respect of Foreign Judgments.—Foreign judgments are as a matter of principle considered binding by German Courts unless the essentials enumerated in par. 328 " German Civil Procedure Law," are not complied with. On the other hand, the judgments of a country with which a treaty exists are automatically binding without examining into the question of compliance with these essentials. No treaty, however, exists between England and Germany. Consequently the German Courts have the duty to satisfy themselves whether an English judgment complies with the requirements of the German law. If it complies then execution-judgment is entered without examining into the legality of such foreign judgment. (Pars. 722–3, " German Civil Procedure law.") What are the essential requirements of the German law in respect to foreign judgments? According to par. 328 of the " German Civil Procedure Law " they are :

(*a*) The Courts of a country which adjudicated on a given matter must have jurisdiction according to the German law. A German Court is not interested in the question whether the Court of another country was the proper tribunal to deal with the matter. It is sufficient if the jurisdiction was vested in the Courts of that country as a whole. This is similar to the English rule.[2] The rules of territorial jurisdiction are very similar to those prevailing in England. Perhaps the main difference in regard to jurisdiction *in personam* is that the German law does not give jurisdiction to another country because of nationality or citizenship, but it follows more strictly the doctrine of domicile or residence. On the other hand, it gives jurisdiction to Germany and consequently to another country

[1] The question of judgments in matters of marriage, divorce and succession, may be reserved for another occasion,

[2] Dicey, 4th Edition, p. 434, subs., and Friedrich Stein, *Commentary on German Civil Procedure Law*, 13th Edition, vol. i, p. 888.

when a person not having domicile in Germany or in this other country has property there.

This principle is unknown to English law. As regards actions *in rem* the German rules are similar in respect to immoveables and exclusive jurisdiction exists for the country in which these immoveables are situated. As to moveables no exclusive jurisdiction is recognized, but they follow the general principles of action *in personam*. The effect, however, may often be the same as under English law as the German law recognizes the jurisdiction of the country of the *loci solutionis*.

(*b*) A German being a defendant in an action in a foreign country and against whom a judgment has been entered, unless he has voluntarily submitted to the jurisdiction of the country, must have been served with the writ in that country, either personally or through the co-operation of German authorities. This is a restriction imposed upon foreign judgments in the interests of German defendants, which is not known to English law.[1]

(*c*) Recognition of a foreign judgment must not violate German public order or the purpose of a fundamental German law. This is in most respects equivalent to the English doctrine of " Natural Justice " in " Private International Law." [2]

(*d*) The reciprocity must be guaranteed in the foreign country. Whereas the requirements listed under *a*, *b*, *c*, are such as have to be complied with in each case (and it is enough if they are), the general requirement of reciprocity is one which has to be judged on general lines. And this brings me to the *crux* of the problem.

Reciprocity with England.—The German *Reichsgericht* has in two early leading decisions [3] dealt with the question of reciprocity with England. These decisions were given in 1882. In vol. vi, no real decision had to be given by the *Reichsgericht* because the findings of the Court of Appeal on questions of fact were considered to be impeachable. In vol. vii, however, there is a decisive case, in which the *Reichsgericht* denied the existence of reciprocity on the part of England. This decision has since been followed in German practice. The case in question was a judgment given by an English Court, which was a competent Court of jurisdiction according to German law. The whole issue centred on the question of reciprocity so far as England was concerned. It is extremely

[1] Foote, *Private International Jurisprudence*, 5th Edition, pp. 613–16.
[2] *See* Dicey, *Conflict of Laws*, 4th Edition, p. 444.
[3] *Reichsgericht*, vol. vi, p. 373, and vol. vii, p. 412, etc.

interesting to note the reasoning of the German Supreme Court. It was to this effect: Reciprocity does not necessarily mean full harmony between the laws of the two countries in regard to the treatment of foreign judgments, because such a harmony of laws in different countries is almost impossible. In judging as to the existence of reciprocity no theoretical or formal construction of the laws has to be considered, but rather their practical effect. In coming to a decision the *Reichsgericht* had before it the following English Authorities: Pigott, *Foreign Judgments*, vol. i (1879) and Alexander, in the *Journal du droit Intern. Privé*, 1878, p. 22 subs., 1879, p. 135 subs.; p. 516 subs.; Westlake, *Priv. Intern. Law* (1880) para. 292 subs.; Foote, *Priv. Intern. Jurisprudence* (1878), p. 445 subs.; Phillimore, *Intern. Law*, 2nd edition (1876) para. 934 subs.; Wharton, *Conflict of Laws* (1872), para. 646 subs.

There was further an official letter from the British Ambassador to the German Foreign Office dated September 24, 1880:

> . . . With the view therefore of removing such misapprehension, in case it should exist, I have been instructed to state, as I have now the honour of doing, that although in England no Statute Law exists on this subject, British Courts of Law have power, in the exercise of their general jurisdiction, to enforce judgments of Foreign Tribunals on proper proceedings being instituted for that purpose, unless the defendant can impeach them as being contrary to natural justice, or on the ground of the judgment having been irregularly obtained. . . .

The *Reichsgericht* objected in the main to the existence of reciprocity on the part of England, because according to English conception, foreign judgments give only rebuttable presumptions of the existence of the original debt, and may be defeated by means of pleadings which permit the English Court to enter into an examination of the legality of the German judgments, whereas the German conception of the legal power of a judgment, either German or foreign, does not allow an examination of the legality of such judgment, if the foreign judgment complies with the essentials above cited.[1]

The possible pleas under English Law were considered as follows: (1) Violation of natural justice. To this plea the *Reichsgericht* did not hold any strong objection, because it did not think it was of practical importance.

(2) The foreign Court was not one of competent jurisdiction.

[1] At the time of this decision the essentials were slightly different from those enumerated above, and were set out in par. 661 of the German Civil Law then in force.

This was held as probably not exceeding the requirements of the German Law itself. At the time of this judgment doubts were entertained by the Court whether, and to what extent, the English practice would allow voluntary submission to foreign jurisdiction, as this submission was then already recognized by the German Law.

(3) The plea of error of fact and of law being apparent in the judgment. As the German Courts give reasons for their decision under the judgment it was felt that a plea of error of fact would enable the English Court to upset a German judgment on these grounds, and so give to the English judge a wide discretion, particularly in matters of a complicated nature. In regard to error of law, particularly of English law by a German judge, it was at that time doubtful to what extent the plea was effective in England. Pleas of error were not recognized in Germany.

(4) Violation of international law, particularly the omission to apply English law. This plea is unknown to German law.

(5) Plea of fraud committed by the plaintiff or the judge. On this point the *Reichsgericht* felt particularly anxious, because this covered a wide field. *E.g.* in cases in which the English law would have to be applied according to the opinion of an English judge, the English practice considered the omission to do so as a wilful refusal by the foreign judge to apply the proper law, and considered it a "fraud." So this plea might according to the views of the *Reichsgericht*, defeat a German judgment in England. It may be noted that by a curious coincidence a leading case, *Abouloff* v. *Oppenheimer*, 10 Q.B.D. 295, which dealt with the impeachment of a foreign judgment for fraud, was decided by the English Court in the same year (1882) and it clearly justifies the doubts entertained by the *Reichsgericht*.[1]

(6) Decisions of foreign Courts in regard to the question of prescription are not recognized by the English Courts. This is the result of a different classification of English law, which considers prescription as procedural law, and not as substantial law, as is the case in Germany. So that German judgments on prescription would not be recognized by the English Courts.

In conclusion, the *Reichsgericht* held that the English practice allowed by means of pleas the examination of the legality of German judgments, and that a German decision similar to that in the case then before the German Supreme Court would be theoretically impeachable in England by means of such pleas, thus leaving the

[1] Dicey, p. 438.

validity of such judgments very largely to the discretion of an English judge. In such a state of law no reciprocity was held to be guaranteed.

The decision in this leading German case is of extreme interest, and calls for serious consideration from the standpoint of present-day conditions. The question that may be considered is if the *Reichsgericht* was right in the conclusions at which it arrived.

It may be well to point out that reciprocity is not a scientific doctrine, because the application of the right is dependent upon the same consideration on the other side, and is thus a weapon in order to obtain this result.[1] Moreover, reciprocity, as is even stated by the *Reichsgericht*, does not mean full identity of legal treatment of valid foreign judgments in different countries, but it is enough if either of two States each treat foreign judgments approximately in the same way, having regard to the distinctions in the particular system of both.[2]

Reciprocity in California.—The German conception of reciprocity may further be illustrated by two other cases in which countries other than England are concerned. In the one case, decided in 1909, the question of reciprocity in California was dealt with.

By a Californian law of March 11, 1907, a judge of that country is allowed to examine not only whether a foreign Court was a " competent court of jurisdiction," but even whether it was a " proper court " according to the laws of this foreign country. This has been held to be contrary to reciprocity in the German sense as a German judge is not allowed to examine whether a foreign court is a " proper " one according to the laws of that foreign country. It was further found that judgments may be impeached to a much greater extent in California than German Civil Procedure Law allows. Here again it was expressly stated that full identity of two systems of laws is impossible, but the final conclusion of the *Reichsgericht* was that the fundamental difference in the conception of the legal power of a valid judgment in both countries excluded reciprocity.

Reciprocity in Switzerland.—The other case is a decision in 1924, reported in *Reichsgericht*, vol. cvii, p. 311. This was a Swiss case. Art. 59 of the Swiss Federal Constitution, dated May 29, 1874,

[1] *See* Frankenstein, *Internationales Privatrecht*, 1926, vol. i, p. 337.

[2] The question of reciprocity is lately dealt with by Kleinfeller, *Gegenseitigkeit* in the *Juristische Wochenschrift* 1924, p. 1326; Max Klein, *Das Erfordernis der verbuergten Gegenseitigkeit* in the *Zeitschrift für Internationales Recht*, vol. vi, p. 97, vol. ix, p. 206; Wittmaak, *Zeitschrift für Internationales Recht*, vol. xxii, p. 8 subs.

rules that actions *in personam* against Swiss debtors residing in Switzerland must be brought in the Court of their domicile. This has been held to be against reciprocity in the German conception, because the execution of German judgments in Switzerland against Swiss debtors residing in Switzerland is absolutely prohibited, whereas the German law would permit of the execution of Swiss judgments in Germany against a resident German subject.

Another provision held to be objectionable to the German conception of reciprocity is par. 107 of the Zürich Civil Procedure Code by which the Zürich Tribunals have not only to examine whether German Courts have jurisdiction according to the Zürich law, but also whether a proper German Court has adjudicated in the matter. This is repugnant to the German point of view.

Judgments delivered in Sweden.—As a last test of the views of the *Reichsgericht*, and of its unbiased adherence to the strict rules of reciprocity, I will quote a judgment reported in vol. viii, p. 386, subs. This deals with a judgment delivered in Sweden in favour of a German resident in Germany. In a fresh action brought by the plaintiff in Germany the defendant pleaded *exceptio rei judicatæ*. Such plea would in any circumstances be valid for a defendant to set up in England. The *Reichsgericht*, however, held that as there is no reciprocity with Sweden, the Swedish judgment could not be pleaded even in favour of a German resident. It may be worth while to cite briefly the reasons advanced by the Court : The German Civil Procedure Law is not intended to favour a German subject before a foreigner, and the question of validity of a foreign judgment in Germany is not to be made dependent either upon the advantage or disadvantage of a litigant merely because he resides in Germany. The power of a judgment rests not on the will of the parties, but on the authority of the proper organ of the power of a respective nation. No judgment has extra-territorial power. An obligation by the Law of Nations to acknowledge and execute judgments of foreign countries does not exist, except by Treaties. If, however, with the new development of international relations, judgments delivered by the Court of one State are also recognized as such by other countries and executed therein, it can be only on condition that the countries will grant the same treatment to each other, and only in so far as this prevails. In this case it was therefore held that a German resident could not plead the *exceptio rei judicatæ*.

Treatment of Foreign Judgments in Germany and England.—Returning to a comparison between the treatment of foreign judg-

ments in Germany and in England under the present state of the law, I find that the fundamental difference as to the conception of the legal power of a valid final judgment will not allow of reciprocity in the German view, although errors of fact and of law in a foreign judgment are nowadays not to be investigated by an English judge,[1] and notwithstanding the fact that pleas of violation of natural justice and of international law are not of any serious importance, as these are both in England and Germany general reservations. The difference in the classification of prescription and of other institutions like set-offs, which in England are procedural law and in Germany substantive law, is leading to unsatisfactory results; still, it would not constitute an obstacle to reciprocity. Neither would the difference in the principles conferring jurisdiction on the courts in both countries nor the fact that English Courts would refuse to recognize a German judgment which only decides in regard to the *causa*, but does not show a liquidated amount of debts, affect the position. Also the difference of the meaning "final" foreign judgment in both countries would not matter. On the contrary, the English conception is here wider.

Plea of Fraud. — More serious, however, is the plea of fraud under English law against all judgments, English included. There is some authority for saying that a foreign judgment may be treated as invalid in Germany if caused by fraud of a foreign judge, but I have not found any decision upon this point which is theoretical rather than practical.[2] However, pleas of fraud alleging fraud committed by a party cannot be brought against a final valid judgment in Germany, but special actions are necessary as provided for by pars. 579–80 German Procedure Law.

But in the case of *foreign* judgments these special actions which pretty well correspond with the English plea of fraud cannot be brought at all in Germany, because according to the German Civil Procedure Law (par. 584) the Court which adjudicated originally and delivered judgment has exclusive jurisdiction to deal with such actions, so that in fact the English Courts would have to retry the case according to English laws. Until that is done, and the judgment is reversed or amended, no German Court would take any notice of such actions or pleas in regard to the *causa* of a foreign judgment. The only occasion on which a German Court would consider pleas in regard to the *causa* of a foreign judgment is when facts are pleaded which originated after the foreign judgment was

[1] Dicey, p. 449.

[2] Stein, *Civil Procedure Law*, vol. i, p. 892.

delivered. And here again a special action is necessary.[1] Or, exceptionally a plea is possible in the procedure of pars. 722–723.[2] But this plea will not destroy the legal power of a valid foreign judgment, it will only prohibit the grant of an execution judgment. That is the strong German conception of the legal power of a valid foreign judgment which in England is only recognized in respect of foreign judgments that are in favour of the defendant.[3] This seems, from the English point of view, illogical. Whilst in both countries a judgment does not destroy the *causa* and merge it in the judgment, in Germany it is the respect for the high authority of the power of a State, which gave the judgment which does not allow the German judge to impeach the foreign judgment until this has been done by the foreign judge himself. The legal effect of a valid judgment in Germany is to bind any later judge to follow the previous judgment, and this being so, process is refused by a German judge if an identical case is brought again for trial, because of the absence of protectionable interests.[4] So it follows that in Germany a new action after a valid foreign judgment is given in the identical matter will be defeated, and the only way to enforce the *causa* of a foreign judgment in Germany is to bring an action for judgment for execution on this valid foreign judgment.[5] In England, however, no immediate legal power is vested in such foreign judgment, and it is possible to sue either on that judgment or on its *causa*.[6] The writ which under English law is necessary to enforce a foreign judgment is brought in order to vest that judgment with legal power in England, whereas in Germany the action necessary to enforce a foreign judgment is only a technical instrument to bring about the execution of such a judgment which already has the legal power behind it. This, in my opinion, is the very reason why England does not give the reciprocity in the German conception, and the view of the *Reichsgericht* is undoubtedly correct.

Remedies.—I cannot see how the unsatisfactory present state of things can be altered merely by leaving it to judicial evolution in both countries. At an International Law Conference in 1913 resolutions were passed in order to move the German Government

[1] Par. 767, *Civil Procedure Law.*

[2] *German Civil Procedure Law.* *See* Stein, vol. ii, p. 443.

[3] Dicey, p. 460.

[4] The modern German doctrine of procedure refuses process if there is no interest in question which needs protection. Such protection is not needed if a valid judgment has already determined the identical *causa* of action.

[5] Pars. 722, 723, *Civil Procedure Law.*

[6] Dicey, p. 459.

to alter the German Civil Procedure Law to the effect that the question of the existence of reciprocity in relation to each country should be determined by an Order of the German Chancellor. I cannot think this would in itself meet the case, because of the complexity of the problem. Objections have been taken only lately by German legal writers to this suggestion.[1]

The only sound remedy, and one which is urgently required, is a Treaty between England and Germany, such as exists between Germany and Austria. Only on this basis will it be possible to bring about satisfactory results, and to remedy the effects of the incompatibility of two legal systems, so that a plaintiff or defendant in an English action after having obtained his due award in England may not be faced later, if execution would be necessary in Germany, with the fact that such award is a nullity in Germany.

[1] *Juristische Wochenschrift*, 1924, p. 327.

FISHERIES AND TERRITORIAL WATERS.[1]

[*Contributed by* Sir Graham Bower, K.C.B.]

It is so common in this country to think and speak of bread and meat as the food of the people that we fail to realize that there are millions, probably amounting to the majority of mankind, who rarely if ever eat meat and for whom fish, rice or Indian corn are the staple foods.

In India, China and Japan the majority never eat meat and amongst the poorer nations and the poorer classes fish takes the place of meat. In Japan the enormous number of 3,358,655 persons are engaged in the fishing industry and the number of boats employed amounts to 400,487. Oysters, shrimps, lobsters and certain seaweeds are cultivated, as are also fresh-water fish, and the gold fish has been " improved " into strange shapes by selective breeding. Fishing is the principal industry of Newfoundland and employs one-third of the whole population.

In Great Britain the value of the fish placed on the retail market is estimated at over twenty million sterling, and as is well known there are numbers of amateurs who fish for pleasure and not for profit. The exports of British fish, fresh, cured and salted, may be valued at six and a half million sterling. In Norway, Sweden, Holland and Denmark fishing is an important industry. Nor is the sea merely a source of food supply; the pearl, the golden-edged pearl oyster from which mother-of-pearl is made, and the sponge are valuable articles of commerce. So it may be said that every nation possessing a sea frontage has an interest in sea fisheries, an interest only inferior, if it is inferior, to its interest in foreign commerce.

Legal Status of the Sea.—It is not surprising, therefore, to find that from the beginning of time the legal status of the sea and its contents has been a subject of discussion and controversy.

[1] *The Origin of the Right of Fishery in Territorial Waters.* By Percy Thomas Fenn, Jr., pp. xv. + 245 (Humphrey Milford, Oxford University Press.). 17*s.* net.
The Law of Territorial Waters and Maritime Jurisdiction. By Philip C. Jessup, LL.B., Ph.D. (G. A. Jennings Co., New York.) $9.

That controversy still persists and is likely to persist for some time to come. For it not only represents the conflict of material interests, but also of rival schools of thought who maintain their theories with all the zeal and many of the arguments of rival theologians.

The two schools in direct opposition are the classical and the practical. The classical seek their solution in what they believe to be the origin of things, in first principles of abstract justice, whilst the practical school base their arguments on facts and the teaching of history and experience. It is not an accident that the two most prominent champions of the rival schools were Grotius and Selden, for Grotius was not only a lawyer but a poet and a theologian, whilst Selden was a patriotic and imperialist Englishman, saturated with English history and the English common law.

To form a fair judgment on the merits of the controversy it is essential that we should be acquainted with the history of the dispute and with the arguments of the rival schools of thought, and Mr. Percy Thomas Fenn, Jr., the Assistant Professor of Political Science in Washington University, St. Louis, has rendered a great service to those who seek an equitable compromise by publishing his exhaustive examination of the origin and development of the two schools of thought, the classical, or as we would prefer to call it the teleological, and the practical or utilitarian.

Beginning with the period before Justinian he traces the origins of the Roman law from its birth as a popular belief to its codification in the *Digest* and *Institutes* of Justinian and its subsequent development by the glossators and the commentators.

The Sea in Roman Law.—The Romans were a nation of agriculturists, soldiers, lawyers and philosophers. It was to be expected therefore that not only did they seek to found their idea of law on the origin of things and of natural justice, but that the orderly classification which seems to be a special gift of the Latin mind should be adopted by them. So we find things classified as *Res divini iuris* and *Res humani iuris* with their respective subdivisions. Under this classification the sea was *res communis* of which the use was common to all the world, the *proprietas* belonged to none. Navigable rivers and ports were *res publicæ*, the property of the community of the State. Wild beasts, birds and fish were *res nullius* until captured, when they became the property of the captor.

The sea-shore was *res communis* but was capable of temporary and exclusive beneficial occupation, as in the case of a fisherman's hut or the space required for drying nets.

The definitions or classifications were sometimes confused. For instance, *res communis* might sometimes be described as *res publicæ*, but the thought that gave birth to the definition runs through the whole development of the classical school. The Romans were not a maritime nation. To them the sea was outside the community. It belonged to the world and not to the community of soldiers, agriculturists and philosophers and earlier Roman law was silent about the sea, the silence of indifference. But it may here be remarked that though there is in the early history of law no record of the practical school, nevertheless in that outside world there was a maritime and commercial nation which has left few records and is known to us chiefly through its enemies, the Jews and the Romans. We know enough, however, of the Phœnician people from the accounts of their enemies to be aware that they did not regard the sea as *res communis*. In the curse levelled against Tyre the prophet Ezekiel (574 B.C.) says: "Then all the princes of the sea shall come down from their thrones and lay away their robes and put off their broidered garments. . . . How art thou destroyed that wast inhabited of seafaring men, the renowned city which was strong in the sea, she and her inhabitants which cause their terror to be on all that haunt it." (xxvi. 16–17.)

It would have been interesting to have known the ideas of these early exponents of the practical school on the validity of the theory of *res communis*, for they had a special source of wealth in the famous Phœnician purple dye derived from two species of shell-fish, the *Buccinum lapillus* and the *Murex trunculus*. In the year 509 the Carthaginians, that is to say Phœnician colonists, made a treaty with the Romans renewed in 378 B.C., which provided that "the Romans and their allies shall not sail beyond the 'Fair promontory'" (probably Cape Farina or else Cape Bon), a flat denial of *res communis*, but made before the principle was formulated by the Romans.

Freedom of the Seas.—This conflict between the classical and the practical view of the freedom of the seas developed into a series of bloody battles fought for the command of the sea, and is an interesting study in politics, but has been rightly excluded from Professor Fenn's study of legal origins.

That study reviews the *Institutes* and *Digest* of Justinian and summarizes the writings of the glossators, a body of Italian lawyers who expounded the *Institutes* and *Digest* but with added glosses. The quotations from the glossators are given textually and as

classicalists they found themselves in flat contradiction to the claims of the mercantile Venetians in the Adriatic.

The Germanic Law and the Feudal Law differed fundamentally from the Roman Law. The Roman Law found its origin in a conception of natural justice, of the origin of things. The German and the Feudal Law were founded on facts or on custom derived from facts. " In the Roman territory conquered by the barbarians each individual was usually judged by the law of his nationality." Under such conditions infiltration was inevitable and the acts, constitutions, etc., of the great emperors show a development from the Classical Roman Law. The Feudal Law was based on the ownership and tenure of land; the man held land of the lord and at the head stood the King as overlord. There were two principles involved in the feudal system, the principle of loyalty and the contractual relation of lord and vassal.

But the sea is not land. Nevertheless, it is included in the Regalia and an officer with special jurisdiction appears—the Admiral —whose duty it is to punish offences committed at sea and to suppress piracy. The admiral *cognosit de delicto facto in mari, quod est de districtu regni, nam in mari est etiam districtus.*

Nam sicut præses in terra debet purgare provinciam malis hominibus, ita amiratus debet purgare cum classicis mare malis hominibus & piratis. Et hoc verum est, si ille delinquens in mari contiguo regni inveniatur.

But the need to reconcile the classic and the practical schools grew and Professor Fenn, Jr., gives us an admirable account of the work of Bartolus in this respect. Facts had proved to the world the need for a jurisdiction over adjacent seas and Bartolus was prepared to extend that jurisdiction to a distance of a hundred miles from the shore; but there was to be no ownership.

Conflict between Grotius and Selden.—It is when we come to the conflict between Grotius and Selden that we find the classical and the practical schools in flat contradiction. Both were extremists who overstated their claims and their case, though they were not so far apart as their writings would lead us to believe, for both were reasonable men, each with a good case, who made impossible claims and supported them by excellent arguments. The controversy is most ably summarized by Professor Fenn and his summary enables us to see the advocate behind the jurist in the case of each.

The Portuguese and Spaniards claimed the right to divide the world under a Donation of the Pope, Alexander VI, an im-

possible claim, and the English desired the monopoly of the herring fishery in the North Sea. The Dutch disputed both claims and Grotius aimed his argument at the Spaniards and Portuguese, but incidentally by a ricochet hit the English claims. Selden replied in two books, the first dealing with law and the other with fact and on paper he had slightly the best of the argument.

That argument still continues and we can only advise all those who desire an amicable settlement of conflicting claims to begin their studies by a perusal of Professor Fenn's exhaustive, impartial and learned exposition of the subject. He leads us from the theory of abstract justice contained in the *res communis* to the hard facts of competing commercial and industrial interests. There is something to be said for both sides and Professor Fenn says it impartially. His book furnishes a valuable and even a necessary introduction to the larger work of Professor Jessup, who unintentionally but most fortunately takes up the story at the point where Professor Fenn leaves off.

Territorial Waters.—Professor Fenn shows how the classical school were driven to acknowledge the need for territorial waters. Professor Jessup shows us how the dispute continues as to the extent and the nature of the jurisdiction implied by those words, and has succeeded in evolving order out of chaos. He begins by assuming that each maritime State may rightly claim as a part of its territory a certain maritime belt subject only to the right of innocent passage and he sets out to prove that this belt is in the most general practice recognized as three nautical miles.

Claims have been made to exercise a limited jurisdiction outside this area. Such claims have been acquiesced in when reasonable; protested against when unreasonable. Putting aside the question of Bays, we might represent Professor Jessup's position graphically on a chart by colouring the sea within the three-mile limit with the national colours, as indications of full sovereignty, painting a much fainter colour outside it representing special control and jurisdiction established by treaty for special purposes, whilst beyond that are the high seas which are *res communis* and without colour.

But practical considerations have induced States to put forward claims incompatible with this general rule or any general rule. For not only do certain claims conflict with the general theory, but the States have not always been consistent. They have varied from the obsolete British claim of the Sovereignty of the Seas, and

the Spanish and Portuguese claim to divide the world, down to the modern definition of the three-mile limit.

The theory of cannon range, "*Imperium terræ finiri ubi finitur armorum potestas*," is obviously a measure of variable length and cannot be quoted in support of any limit. Moreover, it was shown by the action of the French Government in the case of the *Kearsarge* and *Alabama* that it is the gun-range of the belligerent ship at sea that is of vital importance to the neutral population on the shore, an assumption which inspired a British proposal for an agreement with America for the protection of neutral waters and neutral territory against artillery fire from the sea. But the comparison of claims and decided cases shows that, whilst an extended jurisdiction for defensive, or fiscal, or some other special purpose, such as prohibition, is very generally recognized as a practical necessity, every attempt to extend full sovereignty beyond the three-mile limit has met with opposition. In establishing this point Professor Jessup has rendered great service and has laid the foundation of an agreement.

Islands and Rocks.—In relation to the question of uninhabited islands or rocks off the coast the judgment of Lord Stowell in the case of the American ship *Anna* is quoted. The judge said: "I think that the protection of territory is to be reckoned from these islands and that they are the natural appendages of the coast on which they border, and from which indeed they are formed." [1] This judgment and the reasons adduced for it would seem to include the Great Barrier reef of Australia and the channel protected by it. That channel extends from Torres Straits to Sandy Cape, a distance of about a thousand miles, and is lit, buoyed and controlled by the Australian Government; and as we now know that barrier reefs were once fringe reefs it is true to say that they are "natural appendages of the coast on which they border and from which indeed they are formed."

Customs Zones.—The extended Customs and Fishery Zones have been the subject of international controversy and the extended right of Customs rule granted to the United States may be taken as the exception which proves the rule of a restricted area. The concession proves that where facts obviously require an extended regional jurisdiction foreign nations will meet the demand in a reasonable spirit and treat it as a special case. England, which has been the special champion of the three-mile limit, has never failed to acquiesce in a reasonable departure from the strict letter of the law. An example of this occurs in the case of the captain and

[1] 5 C. Rob. 385c.

certain members of the crew of the *Quadra*. (See the judgment handed down by Chief Justice Taft on April 11, 1927, in *Ford* et al. v. *U.S.*) Under the Treaty with Great Britain the right of visit and search for a violation of the Law prohibiting importation of alcoholic beverages is extended to vessels endeavouring to commit the offence. The Treaty stipulations cover the ship which may be seized outside the three-mile limit and taken into port for adjudication, but the Supreme Court has decided that by inference the Treaty may be held to allow the criminal indictment of the captain and crew for conspiracy to violate the Law of the United States though no such extension of jurisdiction is actually expressed in the Treaty. In other words a Treaty relating to things is held to include persons whose occupation connects them with the things.

On this case Professor Jessup remarks that it would probably always be true that one of the conspirators would be a shore representative and it would not be difficult to find some overt act committed within the Court's jurisdiction. This would be sufficient to bring the persons on the ship, though they had never been within the jurisdiction, or within even the twelve-mile limit, under the jurisdiction of the Court.

Space does not permit a summary of the exposition of the question of "hot pursuit" from territorial waters or innocent passage or of the limits of jurisdiction. The line of progress, however, seems to be to grant a measure of extraterritoriality to merchant vessels in matters of internal discipline, and in matters that do not affect the tranquillity of the port. We might add that there are certain nations whose conceptions of law and justice render it undesirable that they should exercise jurisdiction in British ships in cases that do not concern the shore population.

In defending the rejection of extraterritoriality for merchant vessels Professor Jessup says quite truly that "nations are more and more finding it to their interests to avoid mixing in the internal affairs of foreign vessels and the multitude of treaties which incorporate this principle bear witness to its desirability. But bi-lateral treaties are no evidence of a rule of customary law; most nations have admitted the desirability of the extradition of criminals by concluding treaties on the subject, yet extradition in the absence of treaty still fails to be a duty under international law." This is, of course, true if the word "law" be used in the strict sense, but criminals who are guilty of offences that are *mala in se* may be and often are surrendered as an act of comity in the absence of a

treaty, and it is as an act of comity that the forbearance to exercise full sovereign jurisdiction is requested. This was, in fact, the position taken up by the European nations respecting the rigid enforcement of the Prohibition Laws on foreign merchant vessels in American ports. The discussion resulted in a Treaty exempting from penalty or forfeiture sea stores or cargo destined for a port foreign to the United States and conceding the right of visit and search within one hour's distance from the shore in exchange. It is clear, however, that these treaties with America relate to antecedent Law and that they do not give a blank cheque for subsequent legislation affecting foreign vessels. For the general principle that the ships of a nation on the high seas are subject to their own national laws only was one of the causes for which America fought in the war of 1812, and that principle is now as dear to Englishmen as it is to Americans.

Future Developments. — Professor Jessup concludes with a review of the various draft conventions proposed for adoption and submits his own draft. Space does not permit the discussion of these drafts, but there are two observations that at once occur to the seaman. First no provision is made for defining the status of coral reefs or the waters enclosed by them, though it may be that they might be considered islets not continuously submerged, and the status of coral reefs and atolls is likely to be a question of growing interest as the Pacific grows in importance as an area of international interest. Secondly, there is no provision made for future developments. Pisciculture is developing as a science and no industry can be founded nor can capital be sunk in development unless protected. The pearl, the mother-of-pearl shell, other shell-fish and the sponge are all capable of cultivation, whilst the question of refuse oil from steamers considered by the Washington Conference, and the preservation of the whale and the seal are actual problems of to-day and we are informed that it is proposed to introduce and cultivate the herring and the halibut in the South African waters.

It would be a great advantage therefore to the world if a mind so well stored as that which has given birth to this valuable guide to the Law of Territorial Waters was directed to the explanation and clarification of these problems. The easiest solution would probably be found in regional settlements giving jurisdiction for special purposes over specially defined areas. But the solution of regional settlements has to encounter the opposition of the advocate of symmetry and of a universal, uniform limitation for all purposes.

THE EVOLUTION OF THE PRIVATE LAW OF CZECHO-SLOVAKIA.[1]

[*Contributed by* Dr. Karl Szegö, *Rechtsanwalt in Bratislava.*]

The whole legal system of Czechoslovakia is of a dual character, adapted to the geographical areas to which the different laws respectively apply. The Fundamental Law of October 28, 1918, which proclaimed the coming into existence of the independent State of Czechoslovakia provides at the same time that the whole body of laws and ordinances previously in operation shall remain in force in the meantime. Accordingly, in Bohemia, Moravia and Silesia—that is, in the territory of the historical provinces which formerly belonged to Austria—the Austrian law is to be considered as the primary source of law, whereas in Slovakia, which formerly belonged to Hungary, it will be the Hungarian private law. Since the downfall of the old regime the tendency of legislation has naturally been in the direction of unifying these two systems of law, both by introducing reforms called for by the spirit of the age and by the change in the system of government, and also by the elimination of legal provisions which are either bound up with absolute monarchy or are of a feudal character.

We shall mention briefly the laws introduced since the formation of the new State in the different branches of private law, it being understood that we use the term "private law" in the broadest sense as including commercial law, the law of negotiable instruments, the law of bankruptcy, etc.

Law of Persons.—In the law of Persons the age of majority has been fixed at twenty-one years for the whole country, which corresponds to the spirit of the age, seeing that a man or woman of sound mind, and of twenty-one years of age, ought to be of full capacity.

Marriage.—In the sphere of family law the most important change since the creation of the new State is in regard to marriage. Before that time in Slovakia civil marriage was compulsory. A valid marriage could be celebrated only before a government official, and such a marriage could be dissolved only by a state Court.

In the historical provinces of Bohemia, Moravia and Silesia an ecclesiastical celebration of marriage was valid in all the different churches and civil marriage was possible only in a subsidiary manner for such persons as did not desire the ecclesiastical form. In like manner the

[1] Translated by the Editor.

ecclesiastical rules prevailed in regard to divorce. Consequently there could be no divorce of a marriage entered into between Catholic consorts. The Legislature of Czechoslovakia hastened as early as 1919 to introduce a uniform system upon this matter in the two divisions of the territory, but without introducing a uniform marriage law, as it was anxious to avoid religious conflict in the early days of the new State. Under this law civil marriage became optional in the whole territory—that is to say, in Bohemia, Moravia and Silesia, as well as in Slovakia, it being left to the parties whether they would be married by the priest or minister, or by the government official, either form being equally valid; but in future, marriages, however celebrated, were to be dissolved only by the state Courts irrespective of ecclesiastical prescriptions.

Law of Property.—The greatest legal changes are those in the law of property, and particularly the law of real property, which resulted from the social revolution brought about by the War, and by the formation of the new State.

It must be explained that the northern regions of the former Austria-Hungary—that is to say, Bohemia, Moravia and Slovakia, possessed a more highly developed agricultural system than the other territories, having been less ravaged by the Turks in the sixteenth and seventeenth centuries. Owing to the higher development of agriculture, land in these parts of the country possessed greater value, and in this part of Austria-Hungary which now falls within the Republic of Czechoslovakia large *latifundia* had been formed. After the political revolution these great estates continued to exist in this territory, while, on the other hand, a large part of the agricultural population consisted of day-labourers without property and frequently compelled by necessity to emigrate.

A large proportion of these *latifundia* had been brought under Family Trusts or Entails in virtue of which the tenant-for-life could not alienate or burden them, but the lands must pass as a whole, not according to the ordinary law of succession, but according to the terms of the deed of entail, to a single member of the family, whether it was the eldest son (*Majoresko*) or the eldest member of a family (Senior). After the formation of the new State the problem of these *latifundia* and of the division of this property became very urgent for reasons economic, social and national, and all just men interested in the state of society were anxious that this problem should be solved as soon as possible. We do not here discuss, for it would exceed the scope of this article, whether the solution adopted by the Legislature of these questions has been a happy one, or whether it amounts to confiscation or not; we content ourselves with stating the terms of the legislation.

Every estate the area of which exceeds 250 *Hektars* is, in virtue of these laws, seized and taken over by the State. The possessor or owner can only retain at the most 250 *Hektars*, or in exceptional cases 500 *Hektars*. Matrimonial consorts are to be regarded as one person. The

property so taken over is to be divided among the agricultural population owning no property. The owner receives as compensation the average value of the land in the years 1913–15, taking a gold crown as equivalent to a Czechoslovakian *Krone*. The owner must, in addition, provide for the officials, workmen, etc., who have been dismissed, owing to the redistribution. The owner receives the price of the land, either in cash or in the form of a mortgage. Under a supplementary law the *Fideikommisse*, or Entails, are abolished and the property formerly entailed, unless the next three heirs come to an agreement on the subject, is to go on the death of the present possessor to the next heir in full property. Naturally this applies only to the estates of 250 or in some cases 500 *Hektars*, which have been left in existence by the laws just mentioned. These laws have brought about profound social and economic changes, of which it is too soon to foresee the consequences. In the sphere of immaterial property unification has been almost entirely carried through as Czechoslovakia has become a party to the international agreements on this subject, more particularly as regards the protection of literary and artistic works and of industrial property. Unification has been brought about as to patents and trade-marks.

Rent Restriction.—In the field of obligations as to which there is no essential difference in the two halves of the country the only changes to be noticed are those in regard to rent, and these are only transitory. The so-called rent restriction laws (*Mieterschutzgesetze*) restrict the right of the owners of houses to give notice to their tenants or to raise the rent. With the ever-increasing activity in building, which is encouraged by the State, these restrictions are becoming noticeably milder. It is natural that the various new taxation laws, laws as to war loans, laws as to the settlement of debts payable in old crowns should affect the law of obligations; but laws of this kind are too special to be treated of in such an article as this. The law of succession has remained unaltered.

Commercial Law.—In commercial law, the law of negotiable instruments and the law of bankruptcy there is no essential difference between the two territories, seeing that in both the law is based on the old German commercial law, and law of negotiable instruments. In Slovakia partnerships with limited liabilities which had not formerly been recognized, have been regulated by a new law by which they require a licence from the Government. And a new law applying to the whole country has regulated the contract of publication on entirely modern lines.

Several commissions have been busily engaged in the preparation of a new uniform civil code, as well as a uniform Code of Commercial Law, and of the law of commercial instruments, and the completion of these is to be looked for in the near future.

TORTS IN JEWISH LAW.[1]

[*Contributed by* B. B. Lieberman, Esq., M.A., *Barrister-at-Law.*]

It is the aim of this paper to set forth the basic principles and rules of the Jewish Law of Torts. Owing to the vastness of the subject, however, it will not be possible to do more than present the main features.

The Hebrew term for "tort" is *Nezek*, literally "damage," and the department of the Talmud dealing with, among other things, the subject of torts is therefore called *Nezikin* (damages). The Hebrew term for contract is *Ḥob*, literally "debt," because a loan of money was the usual instance of a contract.[2] The distinction between a liability arising from tort and one arising from contract is, of course, fundamental in jurisprudence, and was in fact present in Talmudic law. It was not, moreover, a mere theoretical difference, but had practical repercussions.[3]

Negligence.—The basic ground of liability for tort in Jewish law lies in the infringement of a duty to take care; in the language of the Mishnah[4]: "I am liable for the acts of anything which I am under a duty to guard." The Rabbis derive this principle from the Bible: Exodus xxi. 29, "if he [the owner] does not keep it in [the ox]," and Exodus xxi. 33, "if a man dig a pit and not cover it up." In the opening Mishnah of Baba Kama (the first treatise of the section of the Talmud[5] called Nezikin), where certain main types of instruments of damage are set forth, this basic principle is again enunciated in the following words: "The common feature of these instruments of damage is that they are liable to do damage, and in consequence impose upon the owner the duty of taking care." In other words, negligence is in such cases a necessary element

[1] Paper read before the Society for Jewish Jurisprudence in the Inner Temple on Nov. 11, 1926.

[2] It should be observed that the Hebrew legal phraseology was markedly deficient in abstract terms, the Rabbis usually expressing legal ideas by their concrete embodiments in daily life, *e.g. Yad* (hand) is the term employed for legal capacity; *Peroth* (fruits) is the legal term for goods consumed by user: *res consumptibiles*; *Kelim* (vessels) are goods not consumed by user: *res inconsumptibiles.*

[3] In the case of a liability arising from tort the judgment debt became a prior charge upon the "highest grade" of the tortfeasor's realty; in the case of contract the judgment debt was a charge only upon the "middle grade." There was also a third grade, the "lowest grade."

[4] Baba Kama, chap. i, s. 2. The Mishnah is a compilation of laws made by Rabbi Judah Ha-Nasi at the beginning of the third century C.E. The Rabbis quoted in the Mishnah are called Tannaim.

[5] The Mishnah and the Gemara together constitute the Talmud. The Gemara is a commentary on the Mishnah and embodies the decisions of the Schools from the beginning of the third to the end of the fifth century C.E. The Rabbis of the Gemara are called Amoraim.

in tort. Negligence (*Peshiah*) includes every kind of breach of duty, whether recklessness, gross carelessness or ordinary negligence. It includes acts performed with a deliberate intent, and acts performed without a deliberate intent. The only defence available to the tortfeasor is that of *Onēs* (accident) which corresponds to our plea of "Vis Major." The question of what constitutes *Onēs* is discussed by the Talmudic and the later authorities in some detail, and there is a difference of opinion; but it may be said generally that any act which the defendant could not possibly foresee or prevent is an "accident" and a good defence in an action of tort.

Absolute Liability for Damage by Person.—The necessity for the existence of this element of negligence does not, however, apply to the *whole* province of tort. There exists *one* important department in which the wrongdoer's liability is an absolute one, and does not depend upon the proof of negligence—viz. the class of tort called "torts by the person," *i.e.*, wrongful acts by the *person* as opposed to the *property* of the wrongdoer. In Jewish law it is a matter of vital importance whether the tort is committed by (*a*) the wrongdoer's *person*, or (*b*) the wrongdoer's *property*. In the former negligence is presumed against the wrongdoer and therefore the liability is an absolute one; in the latter the liability is dependent upon proving negligence.

The principle of absolute liability for damage done by the tortfeasor's direct physical intervention is thus stated by the Mishnah[1]: "A man is always liable for his physical acts, whether done wittingly or unwittingly, whether he be awake or asleep." He cannot plead "accident," which is only a valid defence in torts by a man's *property*, but not by his *person*. The Amoraim,[2] however, endeavoured to relax the rigour of this rule. Thus, in case of battery they laid it down that in the absence of negligence only damages for the injured party's physical deterioration (*i.e. Nezek* proper) as estimated by reference to his former value in the labour market could be obtained, but not damages for "pain," "medical expenses," "loss of wages," and "humiliation," which could only be recovered where there exists some element of negligence. Furthermore, some Rabbis held that the plea of "accident" was bad only where the injury was committed upon premises belonging to the injured party; but where the injury was committed elsewhere the plea of "accident" was good, even in case of torts by the person, an opinion which clearly infringes upon the principle of absolute liability. The authorities of the Middle Ages on their part introduce a distinction between "perfect accident" and "imperfect accident," the former being a valid and the latter an invalid defence. "Perfect accident" is called by Maimonides[3] "a blow from Heaven," and thus corresponds to our "act of God." The distinction between these two degrees of

[1] Baba Kama, chap. ii, s. 6. [2] See Note 5, p. 231.

[3] Moses ben Maimon. One of the most famous Rabbis of the Middle Ages, died 1204. Talmudist, philosopher, astronomer and physician. He compiled a code of Jewish law called the Mishneh Torah, a work of great weight and authority.

" accident " is not too clearly defined, but it is evident that the Rabbis were endeavouring to qualify the principle of absolute liability of the tortfeasor in cases of torts by the person.

Consequential Damage.—Counterbalancing the strict rule of Jewish law that every person is under an absolute liability not to cause damage by his physical acts was another rule, viz. that there must be *actual contact* between the tortfeasor and the injured party or object. " Actual contact " may be *immediate* as when A strikes B, or *mediate* as when A throws a stone at B, but must always be *direct*. In other words, there must be an inevitable direct sequence of cause and effect. Where there is an intervention of other agents the tortfeasor, if liable at all, is liable under a special principle called *Gerama* (consequential damage). On this subject there are two conflicting schools of thought throughout the Talmud, some Rabbis [1] holding that a tortfeasor is only answerable for the result which *directly and inevitably* flows from his physical act, others [2] holding that he is liable for remoter consequences also. Probably the view which frees the tortfeasor from liability for any but the direct and inevitable effects of his physical act was a reaction against the strict rule of law that every man is under an absolute duty not to do damage by the acts of his body, for if an *absolute* liability be coupled with a *wide* liability the combination is more than flesh and blood can stand. But this principle, if logically applied, led, as the opposite school of thought pointed out, to such an anomaly, for instance, as that a man who opens the door of his neighbour's stable is not responsible for the escape of his neighbour's horse, because the escape of the horse was not the *inevitable* result of the physical act of opening the door, there being necessary also the desire of the horse to escape ! This difficulty was met by the enunciation of a *moral* principle, " the tortfeasor is not liable under the laws of man, but is liable under the laws of God." [3] The Rabbis of the Middle Ages were also divided in their views, but on the whole inclined to assign liability for remoter consequences also, and such may be taken to be the final tendency of the law on the subject. This principle of " consequential damage," however, only applies to torts by the *person* of the wrongdoer. The tortfeasor is never liable for any but the *immediate* results of the acts committed by the wrongdoer's *property*.

Measure of Damages.—With regard to the measure of damages in tort the rule is that the tortfeasor is liable for the present and the future deterioration in the value of the thing damaged as estimated by the Court. He cannot recover for the loss of profits or " improvement " which he would have enjoyed, were it not for the tort, nor can he recover for being deprived of the use of the article injured. In fixing the damage suffered, the Court estimates it as at the time when the tort was committed. Thus, if A breaks a vessel belonging to B, the former must pay

[1] R. Joshua and his school, Baba Kama, 55*b*.
[2] R. Meir and his school. Baba Kama, 98*b*, 100*a*, 117*b*.
[3] Baba Kama, 55*b*.

its value as at the time of breaking. The pieces belong to the injured party who must allow the tortfeasor their value as at the time when the tort became known to him. Any *decrease* in the value of the damaged object between this date and the date of action brought must be borne by the injured party. An *increase*, however, is shared equally by both parties.

Classes of Torts.—We are now in a position to deal *seriatim* with the various classes of torts discussed in the Talmud and the Codes.[1] As already stated, torts in Jewish law fall under two main heads.

I. Torts committed by the wrongdoer's *person*, being either (*a*) *immediate*, where there is physical contact, or (*b*) *mediate*, where there is no actual physical contact. This is called in the Rabbinic legal phraseology, *Ḥiṣṣim* (arrows).

II. Torts committed by the *wrongdoer's property*, being either (*a*) *animate* objects, or (*b*) *inanimate* objects.

In Class I the liability is absolute, negligence being always presumed where damage is done by the tortfeasor's physical act. The defendant can only escape liability by one of two defences:

1. He can show that the injury was in fact due to the negligence of the plaintiff, *e.g.* if two persons are asleep on the same couch, and one injures the other, the defendant would have a good defence if the plaintiff lay down at his side while the defendant was asleep. For, however high be the tortfeasor's liability, it cannot be so high as to throw upon him the duty of knowing that another person would come and lie down on the same couch. 2. He can plead that the injury was due to the "act of God." As already explained it is the better opinion that such a plea is a valid defence. In Class 2 some taint of negligence is necessary. In cases of torts by the wrongdoer's property where there has been no neglect of duty to take care the injured party cannot recover damages.

Torts by Wrongdoer's Person.—Torts by the wrongdoer's *person* can be subdivided into:

1. Acts against the *person* of the injured party—trespass to the person.

2. Torts against the *property* of the injured party—trespass to land and goods.

1. Torts by the *person* against the *person* throw upon the tortfeasor a liability to pay compensation under five heads.

(*a*) *Nezek* (Damage Proper).—He must pay to the injured party the difference between the latter's present and former values in the labour-market. As already stated this is the only element in the case of trespass by the person to the person for which no negligence need be proved. To establish a claim under the four succeeding heads negligence must be proved.

(*b*) *Sa'ar* (Pain).—As compensation for pain such a sum must be paid as a reasonable man would willingly forfeit rather than undergo that pain.

[1] The best known of these Codes are: the "Mishneh Torah" of Maimonides; the "Tur" of R. Jacob ben Asher (early fourteenth century); the "Shulcham Aruk" of R. Joseph ben Ephraim Caro (died 1575.)

(*c*) *Shebeth* (Stoppage from Work).—The amount to be paid under this head is a sum equal to the wages which the injured person could have earned. If, however, the latter's earning capacity has been reduced and damaged under (*a*) consequently awarded, the amount to be paid for stoppage from work is not his actual loss of earnings, but what he would have lost if he were paid according to his new reduced capacity of earning, *e.g.* if a diamond cutter's hand is injured and he is now only fitted to act as a caretaker, he can only recover the wages of a caretaker, since he has already been awarded the capital value of the difference between his two earning capacities.

(*d*) *Rippui* (Cost of Cure).—The tortfeasor must also pay the medical expenses of the injured party.

(*e*) *Bosheth* (Humiliation).—A sum to compensate the injured party must also be paid for the shame and humiliation suffered, the amount being left to the discretion of the Court, which is to take into account the social rank and position of the parties. The liability to pay compensation for " humiliation " only arises, however, where there was an *intention* to do the injury ; where the act was *unintentional*, compensation is not payable.

As a matter of practice, it may be observed that already in the time of the Amoraim compensation under headings (*a*), (*b*) and (*e*) was not enforced by the Courts outside Palestine, and in later times compensation under (*c*) and (*d*) also became obsolete. Injured parties were, however, not denied their remedy, the Courts making use of their powers of excommunication to enforce the payment of such sums which they considered reasonable under the circumstances—an interesting example, by the way, of the equitable jurisdiction of the Jewish Court.

2. Torts committed by the wrongdoer's *person* against the *property* of the injured party throw upon the former a liability to pay compensation for the damage done. As has been said, the liability is an absolute one, there being a presumption of negligence in all cases of torts by the person. As a rule, the damage consists of actual material injury to a man's property, but may also consist in depriving him of its use and enjoyment. Such are the torts of " stealing " and " robbery," which are not crimes in Jewish law but civil wrongs entitling the injured party to sue for compensation and penalties. The distinction between " stealing " and " robbery " is that the former is a secret, and the latter an open taking away. It may seem strange to the modern mind that stealing is regarded as a civil wrong, rather than a crime by the Jewish law ; but it must be remembered that the Jewish law has its roots deep down into antiquity, and that the distinction between a crime and a tort is a comparatively modern conception. Wrongful acts which we should call crimes to-day, such as stealing, assault, perjury, etc, and which society will punish on its own initiative without reference to the damage suffered by the injured party, were in ancient times only punished *because*

of the damage so suffered.[1] The penalties imposed were not punishments for an act committed against the *community*, but penalties in the nature of compensation for the injury suffered by the *individual*. This was clearly the view-point of the Biblical legislation, and it influenced the whole trend of the subsequent development of the law. An additional factor in preserving this early conception (that theft and other crimes are wrongs against the individual, rather than crimes against the State) was the fact that throughout the Talmudic period the instability of the Jewish State did not favour the growth and the expansion of criminal jurisprudence. The Rabbis, indeed, were concerned to mitigate, rather than enforce, the rigours of such penal enactments as already existed, preferring to direct men's minds to the *moral*, rather than to the *legal*, quality of their acts. Thus in our present instance of theft the Biblical penalties of double the value of the article stolen (Exod. xxii. 3), and sometimes of four or five times the value (Exod. xxi, 37), were declared to be *Kenas* (a fine), and not *Mamon* (damages), and consequently not enforceable by the Courts outside Palestine.

Torts by Wrongdoer's Property.—Torts by the wrongdoer's property are committed either (*a*) by *animate* or (*b*) by *inanimate* objects.

(*a*) Torts by animate objects are in Jewish law subdivided as follows:

(1) *Keren* (horn), a general term for every tort by an animal which is committed *intentionally*, and which is not usual or habitual thereto, *e.g.* goring and biting.

(2) *Regel* (foot), a general term for every *usual* and *habitual* act of an animal done without intention and without any special sense of enjoyment—*e.g.* walking.

(3) *Shēn* (tooth), a general term for every natural act of an animal done with a special sense of enjoyment—*e.g.* eating.

(4) *Ṣ'ruroth* (pebbles), a general term for every tort committed by an animal indirectly or without physical contact, as, *e.g.*, when an animal in walking treads upon a pebble or potsherd, which flies and causes damage.

(*b*) Torts by inanimate objects are in Jewish law subdivided as follows:

(5) *Bor* (pit), a general term for every kind of obstruction, by which living beings are injured.

(6) *Esh* (fire), a general term for an act committed by a moving inanimate object, belonging to the wrongdoer. The following are some of the rules governing these six classes of torts:

1. *The Tort of "Horn."*—The distinction between the tort of "horn"

[1] See Maine's *Ancient Law*, chap. x.: "The penal Law of ancient communities is not the law of Crimes; it is the law of Wrongs, or, to use the English technical word, of Torts." "If the Commentaries of Gaius be opened at the place where the writer treats of the penal jurisprudence founded on the XII Tables, it will be seen that at the head of the civil wrongs recognized by the Roman law stood *Furtum*, or *Theft*." "In the infancy of jurisprudence the citizen depends for protection against violence or fraud not on the law of Crime but on the law of Tort."

and the other kinds of torts committed by animals is that the former is a non-natural and unusual act, while the latter are natural and usual acts. In the case of natural and usual acts (*e.g.*, damage by walking, eating) negligence must be proved, but the law as to non-natural and unusual acts, as, *e.g.* goring and biting, etc., is more complicated. Here a distinction is drawn between a *Tam*, an "innocent," *i.e.* a first offender, and a *Mu'ad*, a "testified," *i.e.* confirmed offender. An animal committing an unusual or non-natural act such as goring, biting or kicking for the first time is a "first offender"; if it commits the same tort on three successive occasions, and is duly "testified," it is converted into an "established offender"; for an act not usual by *nature* can become so by *habit*. With regard to a "first offender" negligence need not be alleged, because it is not the gist of the action, the law throwing upon the owner of the offending animal the duty of paying compensation whether he be to blame or not.[1] On the other hand, since the wrongdoer has not been "negligent," he is not required to compensate the injured party for the *full* loss sustained. He need only pay "half-damages" by way of "penalty"—*e.g.* if an ox gores and kills another ox worth, say, £50, and the carcase is worth £10, the damages payable are £20, *i.e.* half the loss. Moreover, these "half-damages" must be levied out of the "body" of the offending ox, so that if they exceed the value of the offending ox the owner of the latter can escape further liability by handing over his ox in full satisfaction of the claim.[2] It is obvious that "half-damages" is, strictly speaking, outside the law of torts which, in the case of torts committed by a man's property, is founded on negligence. The Talmudic jurists consequently term "half-damages" *Kenas* (penalty), and not *Mamon* (damages proper). As a matter of practice, the payment of half-damages became obsolete already in the time of the Amoraim,[3] the Court through its power of excommunication enforcing such compensation as in its discretion it considered would meet the circumstances of the case.

In the case of a "confirmed offender" *full* compensation was payable. But since negligence is not necessarily an essential element in this class of tort, the Rabbis devised means of limiting the possibility of a "first offender" being converted into an "established offender," by deciding that the same *act* must be committed on each of the three occasions, that the *material circumstances* must also be the same, that the animal shall throughout the whole period belong to the same *owner*, and that the fact of damage shall be notified on each occasion to the Court. It is

[1] The position in English law is different, it being necessary to prove "scienter" before the owner of animals not fierce by nature can be saddled with liability. An animal not fierce by nature is therefore allowed a "first bite"—at another animal or at a human being, unless the owner knew it was vicious. With regard to dogs it has been enacted by Statute (6 Edw. VII, c. 32) that the owner of the dog which bites animals (but not human beings) is liable for the damage done even without knowledge of the dog's mischievous propensity.

[2] These rules are ancient and derive from Exod. xxi. 35.

[3] See Baba Kama, 27*b*.

not difficult to see that in practice the payment of "whole damages" for a "confirmed offender" like the payment of "half-damages" for a "first offender," became obsolete, the Court substituting such a sum as in its discretion appeared to meet the circumstances of the case. No doubt the development of jurisprudence among the Rabbinical Scholars hastened the practical expulsion of the rules relating to the tort of "horn," from the ordinary law of torts, which thenceforth was, so far as torts by the property of the wrongdoer are concerned, uniformly based on the principle of negligence.

2. *The Tort of "Foot."*—This class of tort covers those acts which an animal does *naturally* and *habitually*, but without any intention to injure anything and without any special sense of enjoyment—*e.g.* when an animal breaks anything in the course of walking. The owner is not liable for damage done by this kind of act when the animal is in premises belonging to the public or in premises belonging to himself wholly or jointly. Where the owner has a right to introduce his animal he is not responsible for damage caused to the goods of another person, but he *is* responsible when the tort is committed in a place where he has no right to introduce his animal, there being clearly negligence on his part.

3. *The Tort of "Tooth."*—This class of tort is distinguished from the preceding in that the act is done *deliberately and with a special sense of enjoyment*. Here, too, the owner is only responsible when the offending animal is negligently allowed to enter premises belonging solely to the injured party, but the owner is not responsible when his animal does damage in premises belonging to the public or in premises partly or wholly his own. Nevertheless, as a matter of equity, the owner of the offending animal must always pay for any food which the animal consumes, but only to the value of the animal's *usual* food—viz. corn or barley, although it may have consumed more valuable eatables, such as garden fruits.

4. *The Tort of "Pebbles."*—The fourth kind of tort by animals is called in Jewish law the tort of "pebbles," a term derived from the most common occurrence of this kind of tort—viz. when an animal in the course of walking treads upon a pebble, which then flies and breaks some object. Another instance is frequently cited, viz. when an object is broken through the neighing of a horse or the crowing of a cock. Whenever an animal causes damage *indirectly* and not by physical contact, the owner is as much responsible, where there is negligence in not taking care of the animal, as if the damage had been done *directly* by physical contact. The tort of "pebbles" is an extension of the tort of "foot" and "tooth," to include the case where the damage is not done *directly* but *indirectly*, but with this difference, that only "half-damages" are payable, since there was no direct physical contact.

5. *The Tort of "Pit."*—The term "pit" includes any kind of obstruction causing damage to a person or animal passing over it. The obstruc-

tion may be actually the wrongdoer's property, or it may be something which he has constructed in a public place—that is to say, which he *controls* but does not *own*. The tort of " pit " can only arise in premises belonging to the public or any other place where the injured party has a right of entry, but it cannot arise in premises belonging to the alleged wrongdoer, for there the injured party is a trespasser. Moreover, if the owner of the obstruction has taken the necessary precautions, as by covering the pit or putting an efficient watchman on guard, he is freed from responsibility, even where the watchman has not taken proper care. The injured party must then have recourse to the watchman. In this class of tort, just as the duty of taking care is thrown upon the owner of the obstruction, so is the duty of taking care thrown upon the injured party, and if the latter is not free from blame, the owner of the obstruction is not liable. In this class of tort, too, the defendant is only liable for the *immediate* damage caused by the " pit " but not for *remoter* damage.

Therefore, if A sustains personal injuries from a " pit " belonging to or dug by B, or if an animal belonging to A is similarly injured, A can recover damages from B. But, if the injury is done to some *inanimate object* carried by A, damages cannot be recovered, for the injury to the inanimate object could only have occurred by the intervention of some living being—here A—and it is therefore considered too remote to sustain an action. The result is therefore that the defendant can only be liable in this class of tort for damages caused to *living* beings, but not to *inanimate* objects. The obstruction need not necessarily be immovable, like a pit. It may be capable of being moved, and in such a case liability may attach not to the owner of the obstruction, but to the person who moved it. If a *human being* moves the obstruction and it causes damage, the mover, and not the owner, of the obstruction is liable. If an *animal* moves the obstruction and it causes damage, the liability is borne equally between the owner of the obstruction and the owner of the animal.

6. *The Tort of " Fire."*—The last class of tort is that included under the term " fire," and with this class our review of the subject comes to an end. The tort of " fire " comprises all torts caused by inanimate objects which are capable of being set in motion by ordinary agencies and causing damage in the course of their flight, *e.g.* a fire carried by an ordinary wind. The distinguishing feature of tortious instruments like fire is that they cause damage in the process of *motion*. The agency, however, which sets them in motion must be one that is, or should be, within the contemplation of the owner, *i.e.* an *ordinary* wind, but not an *extraordinary* wind. The owner of a fire means the one whose duty it is to guard it. Therefore, if a person appoints another to take care of a fire lit by him, the latter and not the former is liable.

An important point to be noticed in regard to the tort of " fire " is that it is considered not merely a tort by the wrongdoer's *property*, but also in some respects a tort by the defendant's *person*. In other words, fire and similar tortious instruments may on occasions be regarded

as an extension of the wrongdoer's personality. In the Talmudic phrase, they are the "arrows" of the wrongdoer. Where the damage is the *natural and logical* consequence of the kindling of the fire, it is considered a tort by the *person* of the wrongdoer and, in accordance with principle, the liability is absolute. Such is always the case when the fire is kindled on premises belonging to the injured party. The wrongdoer is liable for *all* the consequences of his act, even though the fire spread in a way that was not likely. If a human being receives a burn, the wrongdoer is liable to pay under the five grounds of compensation as in the case of battery. If the injury is to goods, the owner can claim full compensation, even when the goods are concealed, as by being buried in the ground, provided that they are such as are usually so concealed. Where, however, the tort is not necessarily the natural and logical consequence of the kindling of the fire, but only arises through the intervention of some outside agency, as, *e.g.*, the removal of a wall or other protection against the fire, it is considered a tort by the *property* of the wrongdoer, who will therefore, in accordance with principle, only be held liable if he can be fixed with negligence, as, *e.g.*, in not having the wall repaired. In the case of a burn, he will only pay compensation for *Nezek* (damage proper), and not under the remaining four grounds of compensation, as in battery. He is also not liable for damage to any object not visible to the eye; *e.g.*, if a haystack concealing inside it horses or cattle is burned down through a fire kindled by A on his own land, the latter can only be compelled to pay for the hay burned down, and for such hay as would have been in the space taken up by the concealed cattle. In other words, the liability of a person kindling a fire upon his own premises depends entirely upon the existence of negligence, and is limited to such damage as ought reasonably to have been within the contemplation of the wrongdoer.

Conclusion.—This brief outline of the salient features of the Jewish law of torts is, I think, sufficient to show that it is no mere haphazard collection of legal rules, but is a branch of the Jewish civil law which has been thoroughly explored and investigated and founded on leading principles. The Rabbis, it must not be forgotten, were not only religious and spiritual teachers, but also subtle and learned lawyers. Their religious enthusiasm, however, so controlled their legal acumen as to colour it with a definite tint of humanity and justice, with the result that the whole of the Jewish civil law is permeated by a liberal, humane spirit. It is this humane spirit which was responsible for the rise and growth of the equitable jurisdiction of the Jewish Court, a jurisdiction which, as we have seen it exemplified in the law of Torts, enabled the Rabbis to dispense justice between man and man where the old laws were no longer applicable. It is this humane spirit, too, which renders Jewish law so attractive as a branch of study, and which moreover gives it, in many respects, in spite of its relatively ancient age, the appearance and character of a modern legal system.

NOTES ON IMPERIAL CONSTITUTIONAL LAW.

[*Contributed by* PROFESSOR BERRIEDALE KEITH, D.C.L.]

Dominion Views on the Imperial Conference.—Discussion of the Report of the Imperial Conference in the House of Commons was brief and unilluminating; no motion of approval was brought forward, and the motion for the adjournment for the Whitsuntide recess furnished merely the opportunity for some general observations. The most interesting criticism was that of Sir John Marriott, who pointed out that there was a tendency in Dominion discussions of the Report to accentuate the position of the King as head of the Executive Government of the Empire, but to repudiate the authority of the King in Parliament. He alluded to the sinister[1] associations of this divorce of the two functions of sovereignty, but met with slight comfort from the Secretary of State, who instead developed a theory, to which perhaps too little attention had been paid, of the function of the Crown as "common to the whole Empire, one and indivisible, constituting them all one common body of British subjects, embracing Governments unfettered and free in their action, all morally bound by the fact that they were Governments of the same Crown, responsible to the Legislatures in which the same Crown was a constituent element, responsible to an electorate composed of subjects of the Crown, and, as such, loyal to the Crown and to each other." This is a little difficult to apply to the case of the Irish Free State, in which the conception of Irish citizen has for all political purposes superseded that of the British subject, and the name of the Crown has been sedulously omitted from all governmental and judicial proceedings. The Prime Minister of Newfoundland on May 11 definitely repudiated any complicity in securing the Report, declaring that Newfoundland had not asked for and did not wish autonomy. The change in status would mean that in case of future difficulties, if an application were made to the King and the Imperial Government for aid, *e.g.* in the shape of a Royal Commission, the answer might well be "Physician, heal thyself."

The Attitude of Canada.—Some surprise was caused in Canada by the decision of the Government not to ask for a general vote of approval on the Report, but, as Mr. Mackenzie King pointed out, the course followed was the same as in 1923 when no general approval was given the Report of the Conference of that year, and in point of fact the most important of its recommendations, that on treaty negotiation, was

[1] Cf. the New England view in 1765; *Barrington-Bernard Correspondence*, p. 96.

only homologated by the Canadian House of Commons in 1926 in anticipation of the discussions at the Conference of 1926. Mr. Guthrie, leader of the Opposition for the session of 1927, moved a resolution in favour of securing the assent of the Legislatures of the provinces before any change was made in the British North America Act affecting the provinces; but the motion was defeated by a party vote of 122 to 78. This implied, of course, no disagreement on the principle of provincial assent to change of constitutional privileges. But the observations of the Minister of Justice indicated that, while in theory he agreed that Canada should have full power to alter her constitution without the necessity of an Imperial Act, and to rid herself if she desired of the right of appeal to the Privy Council, he saw no early possibility of making any settlement with the provinces on this basis. He mentioned, however, that opinion in Quebec, as a result of the decision of the Privy Council in favour of Newfoundland on the Labrador boundary issue, was becoming opposed to the appeal; but it may be noted that this is by no means the first occasion [1] on which Quebec has been decidedly indignant, without on calmer reflection showing the slightest wish to reduce the security now enjoyed under the British North America Act or to put an end to the final voice of the Privy Council in all constitutional issues. On one vital matter, on which inquiries [2] have been made in vain in Canada, the Minister was silent. He emphasized the fact that Canada would make treaties, and have them ratified, on the recommendation of her own Government, but he did not state that the King had consented to issue full powers and instruments of ratification on the direct advice of Canadian ministers without the intervention of the Imperial Government, or that the power to issue was to be delegated to the Governor-General, as would logically be necessary on the assumption of the complete equality of the Dominions in matters of external affairs. Equal reticence has been exhibited on this subject by the Governments of the Irish Free State and the Union of South Africa, so that it appears that this point has not yet been conceded by the Imperial Government. The Minister defended the decision to exclude the Governor-General from any power to represent the views of the British Government, on the score that it was inconvenient that an officer who was expected to act on his ministers' advice should also have the duty of reporting on their aims to the British Government. Though not specially convincing, the exclusion of the Governor-General from serving as the channel of communication between the governments has now been made effective in the Irish Free State, the Union of South Africa and Canada. The obvious corollary is the selection of a local man as Governor-General, and on the basis of the autonomy of the Dominions it is clear that His Majesty's assent to such a step may be taken for granted if and when the Dominions so desire. Mr. Hughes has recently made it plain that, when he was in office in the Common-

[1] See Keith, *Imperial Unity and the Dominions*, pp. 375–8.
[2] See 5 C.B. Rev. 307.

wealth, he secured for himself at least the right of appointment with the concurrence of the Crown.

The Question of Neutrality.—Inevitably the issue of the possible neutrality of the Dominions in a British war was raised in the Parliaments. Mr. Bourassa on March 29, with his usual accuracy, propounded the doctrine that it was impossible for Canada to remain within the Empire and at the same time be a full-fledged independent nation. The right to declare Canada neutral was, he held, inconsistent with membership of the Empire, and he commented on the reluctance of the Imperial Government since the Locarno Pact to associate the Dominion Governments in negotiations as to external affairs. General Hertzog, on the contrary, on March 16 insisted that complete independence and membership of the Empire were perfectly compatible. But he evaded the issue of neutrality, and Mr. Tielman Roos, on May 23, admitted quite frankly that the rule of international law made the whole Empire at war if one part was at war, and that, if any change were to be made in the position, it must be by securing an alteration in international law. This statement must, of course, be qualified in so far as only the Imperial Government has, as matters at present stand, the right to declare war, for the power is not delegated to any Governor-General, and hostilities undertaken by any Dominion without Imperial approval could be disavowed, as a matter of international law, by the Imperial Government. On December 16, 1926, the Minister for External Affairs of the Irish Free State made a singularly halting pronouncement on the issue, in which he suggested that some might argue that the Free State could only be at war if the King had been so advised by the Free State Government, but he did not himself accept responsibility for this view, and on February 17 both he, now as Minister for Defence, and Mr. K. O'Higgins, as Minister of External Affairs, admitted that, in the event of an attack on the United Kingdom, the Free State would also be attacked, and they advocated, therefore, preparations for self-defence. The issue, however, was raised again in the Union of South Africa in September as a result of Dr. D. F. Malan's declaration that in his opinion neutrality in a British war was now possible, a doctrine hotly and consistently contested once more by General Smuts, whose attitude has throughout been that the Conference of 1926 introduced no new principle. It was raised also in the Irish Free State in a minor form in the shape of the question put to governmental candidates for election to the Dail as to whether they admitted the right of British troops to act in the Free State for purposes of defence. Major Bryan Cooper, following the precedent of Mr. Fitzgerald, committed himself to the view that British troops could only be used in the Free State with the assent of Oireachtas. It is clear that both these authorities ignore the fact that clause vii (*b*) of the treaty of 1921, which has been given force of law in the Irish Free State by Imperial and local legislation alike, as dominating the construction of the Constitution, assures to the Imperial forces, in time of war or strained

relations with a foreign power, such harbour and other facilities as the British Government may require for purposes of coastal defence, which of course is the only kind of defence in which British troops should need to be employed. This provision clearly overrides Art. 49 of the Constitution if there is any discrepancy, but all that that article provides is that, save in the case of actual invasion, the Irish Free State shall not be committed to "active" participation in any war without the assent of Oireachtas. Active participation doubtless means the use of Irish forces, and would not even technically cover the grant of facilities to British troops to provide, *e.g.*, against submarine attacks. It would frankly be impossible for the British Government to entrust to the discretion of Oireachtas the possibility of preventive measures against such a dangerous contingency.

The Conference and the South African Flag.—It had been hoped that the outcome of the Conference would be the dropping by the Union Government of the question of the creation of a distinctive flag for the Union, other than the maritime flag, with the Union arms, duly adopted in 1910 with Imperial assent under the Merchant Shipping Act, 1894. Unfortunately party disputes resulted in the decision of the Government of the Union to press on with the Bill to create a Union nationality and a Union flag. The former part of the Bill is, of course, based on the action first taken by Canada to define her nationals, and contains nothing open to any criticism, for nothing is done by it to deprive Union nationals of the status of British subjects; it is merely as in Canada the case of a narrower nationality within a wider. The flag issue unhappily revived bitter feelings, sufficiently indicated by the Prime Minister's own plea for the new flag that the Union Jack had been made the flag of South Africa by conquest in the case of all four colonies alike. One great improvement was secured in the chequered passage of the Bill through the Lower House; it was finally agreed, on the motion of a Labour member, to provide that the new flag set out in s. 7 of the Bill should be "the national flag of the Union. The association of the Union with the other members of the group of nations constituting the British Commonwealth of Nations shall be symbolized by the Union Jack." This, it was pointed out, would provide far more satisfactorily for the use of the Union Jack than the original governmental proposal that it should be flown officially on four days a year and on such other occasions as the Governor-General, acting on ministerial advice, should direct. The design finally passed by the Lower House provides for three horizontal stripes of equal width from top to bottom, orange, white, blue; "in the middle of the white stripe within a blue outer bordure and a white inner bordure a shield divided quarterly: (1) Union Jack; (2) Old Transvaal Vierkleur; (3) Old Orange Free State flag; (4) four white stars on a blue field," thus representing the four provinces, but ignoring the mandated territory of South-West Africa, which is, however, to share the flag. The Senate offered stout resistance to the Bill, substituting

in lieu a flag "quarterly of four, party per cross argent: (1) Union Jack; (2) Old Free State flag; (3) Old Transvaal Vierkleur; (4) Azure, four stars argent," the essential difference being that thus the Union Jack and the old republican flags would form distinctive features of the flag in lieu of being relegated to minimal dimensions. In view of this change the Lower House rejected the amendments, leaving the issue to be decided at the usual joint session, in which the Senate would by force of numbers be compelled to yield on the Flag Bill as well as on a controversial measure regarding the diamond industry. But even then the fate of the flag depends on a referendum at which all persons entitled to vote at elections for the House of Assembly may vote. A simple majority of the votes cast, according to the Assembly decision, is sufficient to authorize the adoption of the flag; but the Senate amended this to require that the affirmative vote should exceed one half of the registered voters. It is interesting to note that, while the people of the Union are thus to be accorded full power to decide the issue, the Irish Free State flag has been adopted and used wholly without legal authority of any kind other than the decision of the Executive Council.

Mr. Hughes's View of the Conference.—It must be admitted that by far the most penetrating analysis of the Conference came from Mr. Hughes in the Commonwealth House of Representatives on March 27, when he challenged the assertions of General Hertzog and Dr. Nicholas Murray Butler as to the epoch-making character of the Conference. He insisted that the essential principle affecting the Empire was "perfect autonomy of the parts and unity of the whole," but he recognized that these two principles were so violently opposed that they could not be reconciled if either were pushed to the extreme: "We may do as we wish only if we do not, by our act, impair the unity of the Empire. This unity is vital for Australia. . . . I am for the Empire, because I know of no other way of being for Australia." The question of secession he disposed of by the perfectly sound doctrine that some Dominions might secede, but others could not, because the right of one Dominion to do what imperils another part of the Empire might be met by the right of the part endangered to protect itself. The Prime Ministers of the Empire were equal in status, but not in stature; they could advise the King, but he must act on the advice of that Government which supplied the forces on which the monarchy and the safety of the Empire depended. Further, he pointed out that the King could never act save on the advice of his Imperial ministers, and that no change in the status of the Governor-General could alter that fact. The right of the Dominions to have representatives at foreign courts was in his view unquestionable, but to exercise it might well be undesirable, and he criticized the Report for its failure to recognize the obligations involved in the relations of Australia to the Empire. He insisted also on the value of British protection to the Commonwealth and on the fact that it was utterly misleading to suppose that Australia could remain immune from war dangers

by disinteresting herself in foreign policy and contenting herself with home defence; the greatest menace of future wars lay in the Pacific. Mr. Bruce touched on the duty of other parts of the Empire to share in the burden of Imperial defence, a doctrine which he preached energetically in Canada during his homeward journey from the Conference, but naturally without effect, as was candidly admitted by Senator Griesbach in the Dominion Senate on April 6.

The International Status of the Dominions.—This point, which was treated with much caution in the Dominion Parliaments, was most directly posed by a Labour member in the Commonwealth, who insisted that General Hertzog had demanded at the Conference not merely national status for the Dominions but international recognition of that status. He gathered from General Hertzog's observations in the Union Parliament that his demand had been conceded, and he concluded that the British Empire had now been dissolved into a number of States united by a personal union, and, therefore, in international law capable of making war on one another. Needless to say, the Prime Minister lent no support to this view, and Mr. G. A. Maxwell, K.C., pointed out that internationally the Dominions had not received recognition as sovereign independent States, which, of course, would be inconsistent with the unity of the Empire. The extent, however, of the possibility of development of Dominion diplomatic energies is seen in the decision of the United States to accredit ministers to Ottawa and to Dublin, their credentials being duly presented to the Governors-General of these Dominions. But no suggestion has been made that these appointments, any more than the sending of diplomatic representatives to Washington by the two Dominions, alter the position as regards the treaty power. A treaty can be signed only under full powers issued by the King and ratification needs the King's assent, and in both cases the advice of the Dominion must be homologated by the Imperial Government, which can object, if necessary, to any provisions derogating from the unity of the Empire, and secure the suspension of action pending the intervention of discussions by all the Governments of the Dominions. This accords precisely with the fundamental doctrine laid down by the Imperial Conference that each part of the Empire must consult the other parts in the making of treaties, seeing that the interests of all may easily be affected by the action of one, a doctrine insisted on by Mr. Hughes, who urged that the direct effects of treaties were not the only matter to be considered, but the potentialities of trouble resulting from their operation. Moreover, the Imperial Government was unquestionably a party to the decision that these envoys should be duly accepted, just as it was responsible for securing the acceptance of the Dominion representatives by the Government of the United States.

Canada and the League Council.—The true method of securing for the Dominions that measure of international recognition which is compatible with the unity of the Empire is seen in the election of Canada as

a non-permanent member of the enlarged Council of the League of Nations. The decision last year of the Irish Free State to stand as a candidate was unexpected, and the British Government was unable, owing to earlier commitments, to lend it its support. It was, in any case, more appropriate that Canada should be the first Dominion to attain the position anticipated for it by General Smuts as long ago as 1919. The absence of the United States from the League lends a special appropriateness to the representation of North America on the Council, and doubtless helped to secure for Canada the support of the South American States, which enabled her to obtain 26 votes, as against 43 for Cuba and 33 for Finland, the other two successful members, and 23 for Greece. The election followed rather curiously on the speech of Sir Austen Chamberlain on September 10 in which he declined to consider the revival of the Geneva Protocol of 1924 on the score that it would mean the break-up of the British Empire and emphatically asserted his first loyalty to the British Empire as the older League of Nations. It is clear that difficult questions may easily arise if the independent position of Canada should unduly be pressed, and the value of the British vote might be seriously impaired by the dissent of the Dominion, which, of course, cannot claim to represent the views of the other Dominions. But the general rule of unanimity as necessary for Council decisions lessens the importance of this factor, and the more probable outcome is that, through this recognition of her international position, Canada will be able to find satisfaction for those aspirations to more complete national feeling which unquestionably exist and inspire in some minds the ideal of independence. On the other hand, the fact that Canada doubtless was aided to her position by the votes of the other parts of the Empire does revive the barrier, which from the first was created by the decision to ascribe separate votes to the several parts of the Empire, against the acceptance of membership of the League by the United States. Delicate questions may also be raised as to the right of Canada to vote in the rare cases where the British representative is precluded from doing so by reason of the United Kingdom being involved in a dispute,[1] but the election is simply in accordance with the definite understanding recorded in 1919 by the principal negotiators[2] of the Covenant of the League that the Dominions were eligible for election as members of the Council. Doubtless at the time, in view of the small number of vacant places, the probability of the election of a Dominion seemed slight enough; but the increase of the Council and the cessation of interest in the League by Brazil, the Argentine and Spain have altered markedly the position. It is, of course, obvious that the Dominions will aim in future to secure the rotation among them of one additional seat on the Council. The moral obligation on the British representative,

[1] See the Mosul case, *Journal of Comparative Legislation*, Third Series, vol. viii, pt. 1, pp. 45, 46.

[2] Keith, *War Government of the Dominions*, p. 156.

who speaks under the constitution of the Council for the Empire, to represent Dominion views is not removed by the new step, but is rendered more complex.

The Form of Treaties negotiated under League Auspices.—In the case of the League Assembly on the other hand the Dominions speak for themselves, and the British representatives are concerned only with the United Kingdom and its dependent territories. The inconvenience resulting from the failure of the Covenant to take note of the United Kingdom as a unit should be obviated in future by the adoption in the conclusion of treaties under League auspices of the practice of framing them in the names of the sovereigns of the contracting States and not of the States. Under the rule laid down by the Imperial Conference of 1926 each treaty in future will show explicitly what parts of the Empire are affected by it. On the other hand, the possibility of claiming that League treaties bind the parts of the Empire *inter se*, as might very well have been asserted under the older form, will be obviated. The matter is essentially one asserting the unity of the Empire despite its diversity, and due note has been taken by the Council of the League at its March meeting of the desire of all the members of the League included in the Imperial Conference for the change of form.[1]

The Definition of the United Kingdom.—The Conference is also responsible, not merely for the formal alteration of His Majesty's title to place Ireland as a geographical unit side by side with Great Britain, but for a most useful and desirable definition of the United Kingdom [2] to cover Great Britain and Northern Ireland. It seems clear that the use of the term United Kingdom is decidedly preferable as an abbreviation to that of Great Britain, and the provision must be held as compensating Northern Ireland for any irritation felt at the change of the royal style with its apparent separation of Northern Ireland from Great Britain. The novel term "Great Seal of the Realm" introduced into the Act is picturesque, while the measure itself illustrates the power of Imperial legislation for the whole Empire on the assent of its various Governments. None the less the formal responsibility for the change of style is expressly based on the advice of the Imperial Privy Council,[3] thus forming an excellent illustration of the rule laid down by Mr. Hughes that in the last resort the King must act on the advice of his Imperial Ministers.

Constitutional Changes in the Irish Free State.—The last session of the first Parliament of the Irish Free State was productive of certain important alterations of the Constitution, which in accordance with the express power given in that rather experimental instrument were passed by the ordinary process of legislation without the more elaborate procedure provided to take effect eight years from the coming into operation of the Constitution. The first of these measures [4] provides for the automatic re-election to the Dail of the Chairman in office just before a

[1] Parl. Paper, Cmd. 2894, p. 4.
[2] 17 Geo. V, c. 4, s. 2 (2).
[3] Proclamation, May 13, 1927.
[4] No. 6 of 1927.

dissolution, unless he announces that he does not desire re-election. The number of members for the constituency for which he was originally elected, or any revised constituency declared to correspond to it, is then diminished by one member. The advantage from the governmental point of view of thus securing a Chairman who would be likely to be in effect a supporter of the Constitution and in special of the oath is obvious. The second measure [1] terminated the rule that the day of a general election should be proclaimed a public holiday, a practice found productive of considerable disadvantage as involving economic loss to workers and to traders alike. The third measure [2] extended to six years, or such shorter period as may be fixed by legislation, the duration of the Dail, fixed by Art. 28 of the Constitution at four years; the original view of the Government favoured five years, and the final form of the Act allows of alteration in future by simple Act, without the necessity of a formal constitutional change. More interesting was the decision to alter the restriction of the number of members of the Executive Council to a maximum of seven. The new Act [3] allows of a maximum of twelve, and admittedly the aim of the proposal is to minimize the need for extern Ministers who do not form part of the Executive Council and have no share in its responsibility, but are appointed on the choice of the Dail. If the Council is made up to twelve in number, then there is no possibility of the appointment of extern Ministers, in view of the limitation of the total number to twelve by the Constitution. The reasons for the change are obvious enough: the public could not appreciate the distinction between the two classes of minister and looked to the Executive Council as responsible for every department of government; moreover, the essential connexion of policy with finance meant that the extern Ministers could not effectively work in any sense in independence of the Council, and the obvious solution was to restore to the President of the Council the power of dispensing with any extern Ministers if he preferred, while leaving the possibility of reverting to their employment if circumstances rendered it desirable, without requiring fresh legislation.

The Crisis of 1927.—The election which followed the expiry of the first Dail was marked by the loss by the Government of an independent majority, and by its finding it necessary to rely on the aid of the Farmers' Party and Independent members for its renewed tenure of office. The murder of Mr. O'Higgins in July unhappily resulted in the introduction of drastic measures, involving important inroads on the constitutional securities for liberty of person and freedom to form associations and to express opinions. The Public Safety Act, No. 31 of 1927, gave wide powers to the Executive Council to proclaim associations unlawful, whereupon all members of such bodies are liable to heavy penalties; the printing of documents emanating from or aiding or abetting such associations, without the permission of the Minister of Justice, is made

[1] No. 4 of 1927. [2] No. 5 of 1927. [3] No. 13 of 1927.

criminal; the suppression of periodicals supporting such associations is permitted on order of a judge of the High Court; the Minister may expel from the State persons connected with such associations, and wide powers of search and detention are given to the Garda Siochana. Provision was also made by the Act authorizing the Executive Council by proclamation to set up special Courts for the trial of offences under the Treasonable Offences Act, 1925, or the new Act, to consist of at least three members of whom one may be an officer but must have legal experience, and the others must be officers of the Defence Forces. The decisions of these Courts are not subject to appeal of any kind, but all sentences must be submitted for confirmation to an officer of the Defence Force. The Courts are required to impose the death penalty in every case of treason or murder, and are empowered so to punish the offence of being in possession of firearms without a certificate. Such a proclamation expires in three months, but may be renewed; but either House may annul it within twenty-one days after it has been laid before it, and if Parliament is not in session under an adjournment the proclamation must summon it to meet. Still more important was the Electoral (Amendment) (No. 2) Bill, which imposed on candidates for either House the necessity of declaring on oath their intention to take the oath prescribed in the Constitution for members, and provided that on failure to take the oath within two months after election the seat should be vacated, and the person so losing his seat should be ineligible for election for five years. A third Bill provided for the deletion from the Constitution of the provision under which the Oireachtas might make provision for the initiation of measures by the people, or, failing such action, must if demanded by 75,000 voters submit the question of making such provision to a referendum.[1] The Bill further proposed to limit the right to ask for the suspension of any Bill under Art. 47 of the Constitution to members of either House who had taken the oath.

The Oath of Allegiance.—These measures were followed by the first intimation of desire to oust the Government, the leader of the Labour Party opposing the changes and offering to co-operate with any combination of parties against the Government, which was charged with turning to party advantage the feelings of horror aroused by the assassination of Mr. O'Higgins. Far more important, however, was a temporary alliance entered into by the Labour Party, the National League, whose leader was Captain Redmond, and Fianna Fail, Mr. de Valera's party, with a view to defeat the Government. This involved the taking of the oath by the members of Fianna Fail and their entering the Dail. It was explained that the oath was regarded by the members as a mere formality, and it is significant that in the vehement controversy which followed no statement of views as to this point was given by the Roman Catholic hierarchy. The question of the binding force of such oaths

[1] It was feared that the Republicans would thus secure a referendum on the issue of the oath.

has, of course, long since been discussed in the case of the Union of South Africa. The Nationalist Party of South Africa, by Art. 4 of its Constitution, pledges itself to work for "complete freedom and sovereign independence," but its members, including General Hertzog and Mr. Roos, have never felt their oaths of office as in any way incompatible with this end. The attenuated oath of the Irish member of Parliament can clearly not be regarded as of more binding force, and it must be assumed that an oath of allegiance is compatible with the determination to work constitutionally for the alteration of the established order of things, even to the extent of ultimate abjuration of allegiance. The coalition challenged the position of the Government, but on an even vote of 71 on either side the Speaker voted, of course, for the Government, which was therefore in a position to obtain an adjournment of Parliament until the result of the two by-elections then pending. These gave majorities for the Government and enabled it to advise an immediate dissolution. It may be noted that, though the Constitution forbids a dissolution on the advice of a Ministry which does not command the support of a majority of the Dail, yet it may be doubted whether such a dissolution would not be legal, for it would be possible to hold that the terms of the Constitution are as usual overridden by the treaty, which makes the Canadian constitutional practice binding on the Irish Free State. The allies, however, were able to secure the necessary vote of two-fifths of the Dail to suspend for ninety days the operation of the Electoral Amendment Bill, thus giving time for the presentation of a petition for a referendum on its terms.[1] The Public Safety Bill, on the other hand, was passed into immediate operation, both Houses voting urgency and thus exempting it from the operation of the power of delay, while the third Bill had not been passed by the time when the Parliament was dissolved. It may be noted with satisfaction that the appearance of Fianna Fail in the Dail and its declaration of determination to rely on constitutional means to attain its ideal of independence mark a decided improvement in constitutional conditions in Ireland.

The Election Results.— The governmental tactics in securing an immediate dissolution and in asking the people to give a definite decision between them and the Republicans were not rewarded by success. The final results showed: governmental candidates elected 61, Independents 12, Farmers 6, a total of 79; against Fianna Fail 57, Labour 13, National League 2, Irish Workers' League 1, a total of 73. It is clear that the people have concluded that the return of members of small parties in considerable numbers as at the June election serves no useful purpose, for both the Farmers' and the Labour parties suffered severe losses, including in both cases their leaders. Moreover, it is probable that the decision of Fianna Fail to take the oath was approved by practically the whole body of its supporters, who thus affirm their belief in the funda-

[1] The decision of Fianna Fail to take the oath seems to render the measure of little moment for practical purposes.

mental principle that the proper mode of working for reforms is inside Parliament and not from without, a doctrine the value of which has long been shown by experience in India. The emphatic disavowal by Mr. de Valera of any effort to sever relations with the United Kingdom by means of violence opens up the way for new groupings in the Irish Free State and the effective working of responsible government. Moreover, the fact that the Government of Mr. Cosgrave failed to obtain a clear majority excludes the probability of any drastic use of the Public Safety Act, which if rigorously applied would almost certainly have caused a recrudescence of rebellion.

The Right of Dissolution in New South Wales.—The extreme restrictions placed on the royal authority in the Irish Free State as compared with the Dominions is well illustrated by contrast with the procedure in New South Wales in May. The Premier of the State, having succeeded in quarrelling with his Cabinet on the subject of a proposed appointment, found that body unwilling to concur with him in advising a dissolution of Parliament. The result was that he resigned office, thereby automatically destroying the Ministry. The Governor, whose action, as has been pointed out,[1] has always been marked by strict fidelity to his duty as custodian of the public interest, thereupon commissioned Mr. Lang to form a new Government, on the understanding that he would advise a dissolution of Parliament at the earliest possible opportunity. Such a procedure would be wholly impossible under the Irish Free State Constitution, but its propriety is obvious. The state of affairs in the Lower House conclusively proved that the Labour Government was unable to work harmoniously, while its determination to abolish the Upper House clearly could not be acceded to by the Governor until the public had at a general election declared its decision on that issue. Sir Dudley de Chair, therefore, by his action secured what was in the best interest of the electorate, the grant to them of the power to decide whether they desired the continuance of Labour rule and, as a corollary, the abolition of the Upper Chamber as a restriction on the ideal of one-chamber government now prevalent in Labour circles.

Dominion Courts and the House of Lords.—In *Robins* v. *National Trust Company, Ltd.*,[2] the Privy Council lays down two rules of very considerable interest. The first asserts that it will not overrule the findings of fact of two Courts below, a principle which has often been applied in Indian cases, but which is obviously still more appropriate when dealing with findings of Dominion Courts. The rule, of course, is subject to exception if the findings are based on a misunderstanding of law, which really prevents the findings having the character of "findings of fact." Secondly, the Privy Council held that "when an Appellate Court in a Colony which is regulated by English law differs from an Appellate Court in England, it is not right to assume that the Colonial

[1] *Journal of Comparative Legislation*, Third Series, vol. ix, pt. i, pp. 126, 127.
[2] [1927] A.C. 515.

Court is wrong. It is otherwise if the authority in England is that of the House of Lords. That is the supreme tribunal to settle English law, and, that being settled, the Colonial Court, which is bound by English law, is bound to follow it. Equally, of course, the point of difference may be settled, so far as the Colonial Court is concerned, by a judgment of this Board." This, of course, is in general accord with the views of Dominion Courts on the authority of House of Lords judgments, but it is necessary to note that the remarks of the Board are not essential to the judgment and, accordingly, are strictly speaking *obiter dicta*, which the Board may reconsider if it desires at any time. The matter at issue was a small but interesting one ; English authority,[1] not, however, that of the House of Lords, was in favour of the view that, if a will had been proved only in common form, then if the testamentary capacity of the maker thereof is assailed, even long after, the onus of proving such capacity lies on those who propound the will. On the other hand, the Court of Appeal of Ontario in *Larocque* v. *Landry*[2] took the view that, if the will was once proved, even in common form, it rested with those impugning testamentary capacity to prove their case. The Privy Council was able to avoid choosing between the two views, because, even assuming the English view to be correct, the case of the appellant was impossible. The decision has also interest in that it reveals the Privy Council in its usual attitude of declining to minimize the term " miscarriage of justice " or to permit any slight matter to be regarded in that light.

The Admiralty Jurisdiction of the Dominions.—With unexpected rapidity a definite answer has been accorded by the Privy Council to the question discussed in these Notes[3] as to whether the Administration of Justice Act, 1920, has by s. 5 extended widely the jurisdiction of Colonial Courts of Admiralty without consultation of the Dominions. The Court adopts emphatically the contention which I urged in favour of the view that the Act of 1920 never had any application at all to the Dominions. In both the cases[4] which came before it on appeal from the Exchequer Court of Canada, it had been sought by arrest and proceedings *in rem* by the plaintiffs in the District Court of British Columbia to secure decisions there in respect of alleged breaches of contract outside the territorial limits of jurisdiction by persons not resident in British Columbia. The District Court held that the arrest in each case was valid, essentially on the ground that the wide jurisdiction under the Act mentioned conferred on the High Court of Admiralty passed automatically to the Canadian Courts ; but the Judicial Committee declined to adopt this view as a fair construction either of the Colonial Courts of

[1] *Barry* v. *Butlin*, 2 Moo. P.C. 480; *Cross* v. *Cross*, 3 Sw. & Tr. 292 ; *Tyrrell* v. *Painton*, [1894] P. 151.

[2] 52 O.L.R. 479.

[3] See *Journal of Comparative Legislation*, Third Series, vol. ix, pt. 1, pp. 124, 125.

[4] *The Yuri Maru, The Wuron*, 43 T.L.R. 698.

Admiralty Act, 1890, or of the Act of 1920, which they held to be confined in operation to England. The Court further holds that it is left for independent legislative determination to add to the matters covered by the Imperial Act of 1890, so that Canada is not only fully empowered to confer wider authority on her Courts, but she has the British precedent to encourage her so to act.

The Judiciary and the Executive.—An interesting assertion of the control of the executive government by the Courts is seen in the case of the *Dominion Building Corporation, Ltd.* v. *The King*.[1] The Exchequer Court Act of Canada permits two modes of procedure in respect of claims against the Government of Canada: either a *fiat* may be granted to a petition of right or a reference to the Exchequer Court ordered. The claim in the case in question was duly ordered to be made the subject of a reference, but after the reference had been transmitted to the Court, though before the statement of claim had been filed, an Order in Council was issued withdrawing the reference. The Court declined to recognize the validity of the Order in Council, on the score that thus to interfere with the rights of a litigant after a reference had been ordered could only be justified by some special statutory authority. The validity of this view is clearly strengthened by the fact that a Dominion Act of 1923 (c. 25) expressly gives power to revoke a *fiat* to a petition of right in any case in which the *fiat* has been obtained by a misrepresentation or concealment of material facts, but is silent as to a reference.

Escheats in Alberta.—The seemingly endless question of the provincial claims to escheats and *bona vacantia* has been raised once more in Alberta, and a further step in the process of elucidation taken in the shape of the overruling by the Supreme Court of the Dominion[2] of the view as to escheats taken by the Appellate Division in Alberta.[3] That *bona vacantia* as opposed to escheats fall to the Crown in its right of the province is not denied by the Supreme Court, which agrees also with the Appellate Division that the Dominion obtains escheats of lands patented after the creation of the province. But the Supreme Court holds that this is still good law as regards lands patented before the coming into being of the province. Moreover, it has applied once more the fundamental principle that what a province cannot do directly, it cannot do indirectly. The Legislature of Alberta by the Ultimate Heir Act, 1921,[4] provided that the University should be the ultimate heir and next-of-kin of intestates dying without heirs or next-of-kin. The Supreme Court, however, declined to regard this interesting measure as a fair exercise of the right to legislate as to inheritance, which of course belongs to the province; it ruled that it was an effort to appropriate to an institution land which vested in the Crown in the Dominion immediately on the death of the owner. The ruling, of course, does not affect the Act so far as it extends to personal

[1] See 5 C.B. Rev. 210.

[2] *Attorney-General of Canada* v. *Attorney-General of Alberta*, [1927] S.C.R. 136.

[3] [1926] 1 W.W.R. 337.

[4] *Rev. Stat.* 1922, c. 144.

property, and it can hardly be suggested that the invalidity of the Act in one respect is sufficient to invalidate it in its other aspect.

Indirect and Direct Taxation.—For once there has been complete unanimity between the Courts of British Columbia and Canada and the Judicial Committee [1] in deciding against the validity of the Fuel Oil Tax Act, 1923, of the province, which imposed a tax on every first purchaser of fuel oil imported into or manufactured in the province. The main objection to the validity of the tax was, of course, that it was not a direct tax, in accordance with the definition of John Stuart Mill, whose view has now become the accepted standard in the Courts. The essential feature in the case is the emphatic refusal of the Courts to distinguish between instances in which under special circumstances the tax might be actually direct ; in this case the railway company, the first purchaser, actually used the fuel oil, and thus in point of fact the tax was demanded from the person who was intended to bear the burden, and in no sense was it passed on. But the Courts insisted that the true criterion was simply that fuel oil was a marketable product and that it could be resold, in which case the tax would obviously be indirect. As a similar doctrine has been recently applied in Australia to invalidate the petrol tax imposed in South Australia by Act No. 1681 of 1925, it was natural that an effort should have been made to impugn the British Columbia Act as an excise duty and therefore not within provincial power ; but the Supreme Court and the Privy Council alike declined to express any opinion on that head.

Dominion Jurisdiction over Railways.—A decision on a vital issue of Dominion powers was successfully evaded in *Luscar Collieries, Ltd.* v. *Macdonald and others*.[2] The Dominion is given by the Constitution no general power over local works within a province such as railways, but it has under s. 92 (10) authority over local railways connecting the provinces with other parts of Canada, and over any local work which Parliament declares to be for the general advantage of Canada. The vital issue, of course, is how far this power extends, and in the Railway Act, 1919, the Dominion provided that any railway controlled, leased or operated by any company over which the Parliament of Canada had jurisdiction should be deemed to be for the general advantage of Canada. In the case the Luscar Branch line was claimed as within federal jurisdiction on either ground, and the Privy Council, agreeing with Duff J. and Rinfret J., held that the line, since it connected with a line which connected with another province, plainly fell within Canadian jurisdiction as a connecting line, though it itself was wholly within the province. The Committee declined, therefore, to enter into consideration of the much larger issue whether the declaration of the Railway Act could be deemed to be a due carrying out of the power given by the Constitution, and it appears from the tenor of their reference that in their view the question

[1] *Attorney-General for British Columbia* v. *Canadian Pacific Railway Co.*, 43 T.L.R. 750 ; [1927] S.C.R. 185.

[2] 43 T.L.R. 801.

is entirely open. In the Supreme Court the validity of the legislation was definitely asserted by Mignault and Newcombe JJ., but the point was not admitted by Duff J. or Rinfret J., while Idington J. was in favour of the invalidity of the Dominion claim on both heads. The objection, of course, to allowing a wide interpretation of the power is that under it a grave inroad might be made on provincial authority,[1] and the Judicial Committee is clearly not anxious to accord approval to anything of the sort. Provincial feeling against Dominion encroachments has also found expression in the objections raised to the use of the power of Canada to deal with matters made the subject of international treaties and thus by accepting agreements to become entitled to invade the provincial field in matters social and industrial. But so far comparatively little cause for complaint has been given by the Dominion, the most controversial issue being that of the restrictions on British Columbian anti-Japanese legislation.

Retirement of Canadian Judges.—The decision of the Dominion Government to lay down a retiring age of 75 for members of the Dominion Courts is in harmony with the general feeling in the Dominions [2] against allowing judges to remain on the bench after their faculties are impaired by old age. But unquestionably it was a somewhat difficult step to take in view of the fact that the British North America Act ensures that the tenure of judges of the provincial Superior Courts is during good behaviour, and the fixing of a shorter tenure cannot be directly enacted without an amendment of the British North America Act, though as in the Commonwealth of Australia it is possible to bring about retirement by indirect means of persuasion. Some criticism was directed during the passage of the Bill in the House of Commons against the proposals that the new rule should be made applicable to existing judges, but Dominion legislation has not in this matter considered that the interests of the individual should be allowed to block an important reform.

Divorce Jurisdiction.—It was inevitable that after the deviation from the rule of domicile as the basis of divorce jurisdiction made as regards Indian and colonial divorces in 1926,[3] the logical step should be taken of proposing to extend more widely the principle, and to apply it to the United Kingdom or Great Britain, as suggested in the Divorce Jurisdiction (Overseas Domicile) Bill introduced into the Imperial Parliament by Mr. Williams and given a first reading by a large majority, overruling a protest against thus seeking to expand the arrangement made in 1926. The introduction of the measure was justified by reference to the case of wives who married men from overseas during the war period, and since have been deserted and are unable through reasons of poverty to resort to the oversea court of domicile in order to obtain

[1] Compare the case of the Grain Act of 1925 with Mr. Troop's note, *Journal of Comparative Legislation*, Third Series, vol. ix, pt. ii, p. 46.

[2] See *Journal of Comparative Legislation*, Third Series, vol. ix, pt. i, p. 129.

[3] See *Journal of Comparative Legislation*, Third Series, vol. viii, pt. iv, p. 288; vol. ix, pt. i, p. 128.

redress. Their case was covered to some extent by the temporary measure passed in 1919, which permitted the English Court to exercise jurisdiction with the assent of the Dominions in case of members of the Dominion forces; but the short duration of the Act deprived it of any great utility, and unfortunately, as it was decided not to allow the Act of 1925 to be made applicable facultatively to the Dominions, though no satisfactory reason for this omission was adduced, it is impossible to say how the Dominions would regard the proposal to deviate from the rule of domicile. In view, however, of the fact that Dominion legislation is in favour of allowing the deserted wife to sue in the Court of the domicile she shared before the desertion,[1] it is possible that the new proposal might not raise very serious objections. On the other hand, it is clear that the present suggestion goes far beyond Dominion precedent, for it is recognized that the wives in question have never as such been domiciled in England, and England has never been in any sense the home of the husband. It seems, therefore, that as in 1919, it would be proper to secure Dominion assent before any legislation is proposed with governmental authority, the matter being plainly very badly suited for disposal as a private Bill. Curiously enough, the question has also been raised by a private Bill in the Union of South Africa, where it is proposed to give the right to a married woman to sue for divorce on the score of desertion or adultery, provided either that she was domiciled in any part of the Union prior to her marriage, or that the offence complained of was committed in the Union when the defendant was domiciled there, and in any case that she is resident in the Union and intends to reside there. It is curious that the proposal was supported by the citation of the view held, very doubtfully, in 1907 by Professor Dicey, but long since abandoned by him, that a divorce of this kind would be recognized as legal in England; what is certain is that such a divorce would be absolutely void, and the unfortunate husband, if in England, would be divorced as regards the Union and bound as regards the United Kingdom and the whole of the Empire, and, if he married again, would be guilty of bigamy. The hardship to the husband was strangely ignored by the proposer of the measure in his anxiety to see justice done to the wife, but on the advice of a lady advocate, he consented to provide that residence must be for three years before suit, as a means of preventing miscarriages of justice. The proposal is significant of the need of the treatment of the question by agreement between the Governments of the Empire and not through the medium of private Bills, however convenient it may be for Governments to evade responsibility by allowing the Legislatures to decide without adequate knowledge of the inter-imperial issues involved.

The Limits of Territorial Waters.—The decision of the Court of Appeal in *The Fagernes* unfortunately throws no clear light on the difficult question of the extent of English jurisdiction over the Bristol

[1] As in Scotland; see Dicey and Keith, *Conflict of Laws* (ed. 4), p. 424, note (*c*).

Channel.[1] The importance of the case lies in the fact that the Court felt that it was bound, without regard to other considerations, to accept the information given by the Attorney-General,[2] on the authority of the Home Secretary, that the Crown did not claim that the place where the collision occurred was within the territorial limits of jurisdiction of the Crown. Atkin, L.J., expressly stated that his decision was not on a point of law, and that the only responsibility assumed by the Court was that of treating the statement of the Crown by its proper officer as conclusive; Bankes, L.J., in expressing doubts as to whether he would have agreed with the Court below on the evidence, rested his decision on the assertion of the Attorney-General, taken in conjunction with the absence of any evidence of effective occupation and the trend of modern opinion in favour of limiting the area claimed as territorial waters. Lawrence, L.J., was clearly doubtful of the correctness of the decision of the Court below on other grounds, but he also insisted on the view of the Attorney-General as proper to be deemed binding on the Court. The interpretation to be put on the decision in *Rex* v. *Cunningham*,[3] and on the reference to it in *Direct United States Cable Co.* v. *Anglo-American Telegraph Co., Ltd.*,[4] was left in doubt by the Lords Justices, for Bankes and Lawrence, L.JJ., were inclined to put a much narrower interpretation on the language of Cockburn, C.J., and Lord Blackburn than commended itself to Atkin, L.J. The question of the King's Chambers was also left in dispute. The attitude, however, of the Crown was merely in accordance with its invariable practice for many years to seek to secure the restriction of territorial waters within narrow limits, and to make no claims for British jurisdiction save such as rest on an unquestioned basis of regular usage and international sanction, as for instance in the case of the North American fisheries case in 1910.

The Labrador Boundary. — The decision of the Privy Council in favour of Newfoundland on the long-disputed issue of the Labrador boundary[5] has, as mentioned above, excited a measure of annoyance in Quebec for which it is difficult to find justification. It is indeed surprising that the Government of Quebec was not sufficiently well advised as to agree with Newfoundland, in the long period of discussion before the reference to the Council was decided upon, to purchase the disputed territory on equitable terms. The readiness of Newfoundland to strike a bargain can hardly be doubted, in view of her continual financial straits, but Quebec evidently rated far too high her chance of success in law. Canada was forced to contend that the strip of coast placed under Newfoundland jurisdiction extended merely to an undefined limit representing so much of the coast as was "accessible and useful

[1] 43 T.L.R. 746. For the original judgment see *Journal of Comparative Legislation*, Third Series, vol. viii, pt. iv, pp. 290, 291.

[2] Contrast *Musmann* v. *Engelke*, 43 T.L.R. 685, as to diplomatic status, *per* Scrutton and Sargant, L.JJ.

[3] Bell's *Crown Cases*, 72, 86.

[4] 2 App. Cas. 394, 419.

[5] 43 T.L.R. 289.

to the British fishermen annually resorting to the coast," and the fact that she offered to adopt a mile limit as a working settlement sufficiently weakened her case. Moreover, it is clear that so limited an area of jurisdiction could never have been of sufficient extent to protect the important salmon fisheries. Very interesting was the use made by Canada of the famous proclamation of 1763, for it was claimed that it was intended by that document to reserve the Indian lands, *i.e.* the hinterland of Labrador, from colonial jurisdiction. But there is no doubt as a matter of history [1] that the intention of the British Government was to secure from molestation by the American colonies the Indians lying to the west, and that protection for the Labrador Indians who were allies of the French was not under consideration. Further, all the evidence of actual jurisdiction by Newfoundland proved conclusively that no idea of reducing the Newfoundland rights to the mere edge of the coast ever entered the heads of those concerned, the judges exercising functions far beyond the coastal area, while in 1864 Mr. Donald Smith, later Lord Strathcona, after some demur yielded the right of Newfoundland to demand payment of customs duties on goods imported by the Hudson's Bay Company. The Imperial Government was equally clear in its action; its grants of land to the Unitas Fratrum in 1769, 1774 and 1821 and of mineral rights to John Agnew and others in 1774 clearly treat the coast of Labrador as extending many miles into the interior. Canada for her part could prove no such acts of jurisdiction, and, while it was expressly laid down that maps issued on the authority of Canadian Government departments were not to be regarded as admissions binding the Canadian Government, it was shown conclusively that the Canadian maps assumed that the boundary ran in the main as desired by Newfoundland, and that not until 1900 was a map issued which supported the Canadian claim, but marked the boundary it showed as undefined. It is noteworthy that the decision rested entirely on legal grounds; the Council was not concerned with a proper boundary but merely with the interpretation of the legal instruments, and under these the claim of Newfoundland now stands affirmed to an area of 100,000 square miles, whose value has now become assured through the increasing demand of new supplies of timber suitable for pulping, but which prior to 1888 was deemed so worthless as to excite no interest whatever in Canada.

[1] Alvord, *The Mississippi Valley in British Politics*, i. 172ff.

NOTES.

Copyright in Egypt.—M. Linant de Bellefonds of the Egyptian Ministry of Justice contributes to *L'Égypte Contemporaine* for February 1927 an interesting article dealing with the existing position of Copyright in Egypt and proposals for reform. There is no enacted law protecting the rights of authors in Egypt. This defect is in part made good by the Mixed Courts which have given them some protection in conformity with Article 34 of the Decree of Organization of Mixed Suits which provides that where the law is silent or obscure the judges shall apply the principles of natural law and the rules of equity. M. de Bellefonds, however, points out that a tendency has recently manifested itself to depart from what was deemed the established jurisprudence, and this makes statutory provision the more necessary.

Egypt has recently been definitely invited through the League of Nations to adhere to the Berne Convention and to join the International Copyright Union. It appears that the Egyptian Government is seriously considering the desirability of taking this step, and a Law of Copyright has already been drafted by a Commission attached to the Ministry of Justice. It is not, one gathers, proposed that Egypt should accept in full the revised Berlin Convention of 1908. M. de Bellefonds discusses the advantages and disadvantages which, from an Egyptian point of view, would follow adherence to the revised Convention or to the original Convention of 1886. Owing to the scarcity of original scientific and technical works in Arabic, translations or adaptations of European works have been published in that language at times without any acknowledgment of origin, to say nothing of payment of royalty or the like. M. de Bellefonds appears to favour the view that Egypt would sufficiently protect the rights of authors in this particular by adhering to the original Convention of 1886 as modified at Paris in 1896 at least as regards scientific and technical works. As regards other publications, the revised text of 1908 should be accepted. If Egypt adopted this course a foreign author of a scientific or technical work would have the exclusive right to publish translations thereof for 10 years after original publication, but if he failed to exercise this right it would be thereafter open to others to publish translations for the Egyptian public. It appears that Italy has adhered to the Convention on these terms, but it is to be noted that both Palestine and Syria have accepted the revised Berlin text which protects the exclusive right of translation during the whole period of protection granted to the original work. M. de Bellefonds indeed favours this more

generous course in the case of other than scientific and technical works. Certainly as regards these latter, the author suffers less by a reduced protection, since most scientific and technical works are out of date in ten years. Various other points of importance in connexion with the proposed adherence of Egypt to the Union are dealt with by M. de Bellefonds—reproduction of newspaper articles, the protection of public interests in republication, etc., but for these the reader is referred to the original article.

F. M. Goadby.

Adoption and Legitimacy.—The English law of personal status has been modified for the better in 1926 by two laws, namely, the Adoption of Children Act, 1926 (16 and 17 Geo. V, ch. 29) and the Legitimacy Act, 1926 (16 and 17 Geo. V, ch. 60).

Both these measures had been recommended by the Committee on Child Adoption under the Chairmanship of Sir Alfred Hopkinson, K.C., which reported in 1921 (Cmd. 1254).

The English law for the first time recognizes adoption as a legal institution, although as we shall see later, it accords to it only very limited effects.

During the last few years there has been in many countries a rather singular revival of interest in adoption which for a long period had been losing ground.

In a society in which ancestor worship prevails it will always be a great object to secure the continuance of the family religious rites, and adoption must, therefore, be an important institution, as it was among the early Greeks and Romans, and as it is to-day among the Hindus.[1]

And, in the early German law adoption plays a considerable part.[2] But in Western Europe in the Middle Ages adoption as a legal institution either fell into complete disuse, as was the case in France, or at any rate ceased to be common. And although it was reintroduced into the French law in 1803 it was under conditions which made it inapplicable except in very special cases.

In order to adopt a child the adopter must either have saved its life in a combat or have rescued it from flood or fire, or else he must have supported the child continuously for six years.

But the *loi du* 19 *juin* 1923, amending arts. C.C.F. 343 *seq.*, removes these restrictions and places adoption in France on a practical basis.

Many other countries have laws of recent date dealing with adoption. It is carefully regulated by the German Code (B.G.B. 1741, *seq.*) And it is a striking fact that adoption as a legal institution has been introduced successfully into every State of the American Union, Massachusetts leading the way in 1851. In many of the British Dominions also there are

[1] See Kohler, *Zeitschrift für Vergleichende Rechtswissenschaft*, 3, p. 408.

[2] See Brissaud, *Histoire du Droit Français*, 2, 1129; Brunner-Heymann, *Grundzüge der Deutschen Rechtsgeschichte*, 6th ed., 229 and the bibliography.

new laws of adoption.[1] In England adoption *de facto* has become noticeably more common in recent years, partly no doubt as a result of the war.

Parents who had lost an only son have sometimes adopted a child, and childless widows, or women who had been engaged to men killed in the war, have sought consolation in this practice. In part also the general spread of interest in child-welfare, and a more humanitarian spirit have contributed. Until the recent Act these private arrangements were extremely unsatisfactory from their precarious character as well as for other reasons. In principle the father could not surrender his rights, and it happened too often that after the adopting parent had taken charge of a child for years and had, perhaps, come to feel for it as his own the father would turn up and claim his child back.

Experienced social workers who gave evidence before the Parliamentary Committee deplored the discouragement thus given to the practice of adoption. They were agreed that for normal children the chances of happiness were greater if they were adopted than if they were brought up in institutions. Adoption in the opinion of these witnesses was frequently highly beneficial to the child.

The great benefit of the new law is that it secures the position of the adopted child in its new family and prevents its being reclaimed by its natural parents. This is a considerable step in advance, but in other respects the new Act is sadly emasculated.

It does not confer on the adopted child any right of succession to the adopter. This is contrary to the recommendation of the committee and to most continental laws including the French and German. In France, for example, the adopted child acquires all the rights of succession which a lawful child has in the succession of the adopter though not in the succession of the adopter's relatives (C.C.F. 357). And this is notwithstanding the fact that by the French law a father cannot defeat his child's rights to a fixed share in his estate.

In England, where the father can if he chooses make a will depriving his children of any share, it would seem to be much easier to put the adopted child in the position of a natural-born child. And, seeing that the present Act gives no rights of succession, it is the more regrettable that it does not extend to Scotland. If rights of succession had been involved there might have been objections in Scotland on account of the law of legitim though similar objections have been overcome in France. This question being, however, out of the way for the moment, it is difficult to see any reason for not making the law apply to both countries. There are no differences between the social conditions of the two countries which would make the new Act unsuitable for Scotland where adoption *de facto* is by no means uncommon and much difficulty has been caused by the want of legal recognition. It may be remarked in passing that in recent years Scotland has been slow to follow English legislation.

[1] See e.g. *Journal of Comparative Legislation*, 3rd series, vol. iii, pt. iv, p. 165; vol. viii, pt. iii, p. xxxvi.

So far, the profound changes made in the English law of real property and succession have led to no corresponding alteration of the law of Scotland, and the two laws seem to be drifting more widely apart.

The Legitimacy Act, very late in the day, brings the English law into line with the law of nearly all continental countries as well as that of Scotland in admitting legitimation *per subsequens matrimonium.*

Its passage through Parliament was a stormy one, and much delay had been caused mainly on account of disagreement in regard to adulterine children. In the result the Act excludes from its benefit illegitimate children whose father or mother was married to a third person when the child was born. There is no doubt much to be said on both sides of this question. The canon law likewise excludes adulterine children, and, so, in terms, does the French law. But by recent legislation in France several classes of adulterine children may be legitimated *per subsequente matrimonium.* This is the case with (1) a child born to a mother who for more than 300 days had been judicially authorized to live apart from her husband; (2) a child conceived during marriage if the husband " disavows " the paternity and proves that he could not have been the father ; and (3) a child of a father who was married to a third party when no legitimate descendants of that marriage are in existence (Loi 25 avril 1914 amending C.C.F. 331). It will be seen that these restrictions to a great extent nullify the rule of the old law that adulterine children cannot be legitimated.

This is undoubtedly the tendency of legislation. It no longer appears self-evident that children should be penalized for the immorality of their parents.

The German law makes no distinction between adulterine children and other illegitimate children as regards legitimation.

The supporters of the new English Act were not strong enough to carry a measure under which a child could be legitimated whose parents were not free to marry at the date of its birth. They wisely decided that half a loaf was better than no bread.

Another restriction of much less importance is that the legitimated child cannot succeed to or transmit any title of honour. As far as this goes the Lords were of the same mind in 1926 as in 1235—*omnes Comites et Barones una voce responderunt, Quod nolunt leges Angliæ motare.*

It is, we think, a blot upon the new Act that it does not legitimize the children of a ceremonial marriage which one at least of the parties believed to be valid.[1] In its application to Scotland there are regrettable obscurities.[2]

F. P. W.

Scandinavian Law of Husband and Wife.—A pamphlet by Johannes Faurholt and Per Federspiel, issued by the Danish branch of the International Law Association, gives a summary of the recent reforms. They

[1] See *Journal of Comparative Legislation*, Third Series, vol. ix, pt. i, p. 130.

[2] See *Scottish Law Journal*, 1927, p. 223.

present a particularly interesting example of unification in an important branch of law. Largely, we believe, through the energy of Professor Viggo Bentzon of Copenhagen there is now one and the same law as to marriage, divorce and the legal effects of marriage upon property, in Denmark, Norway, Sweden and Iceland, and a corresponding statute is in course of preparation in Finland. A few points in the new law may be noted. There is an action of damages for breach of promise, but the damages are limited to making good pecuniary losses sustained by the plaintiff. There are no "sentimental" damages. There can be no valid marriage of a woman under 18 or of a man under 21 without the consent of parents or guardians. Impediments to marriage are much restricted. Consanguinity is only a bar between lineal relations and brothers and sisters, and affinity only a bar between persons one of whom has been married to a lineal relation of the other. Even in this last case a dispensation may be granted by Royal licence provided the former marriage was dissolved by death, that there were no children of the marriage, and that there are special reasons for making an exception. There is complete freedom of choice as between the civil and the ecclesiastical form of wedding. A marriage once celebrated, there is no such thing as a decree of nullity *ab initio*. There may be a decree of nullity *ex nunc* on the ground of error as to the nature of the ceremony, or of fraud or duress, or that the marriage was bigamous or incestuous. And such a decree may be obtained for breach of condition on the ground that the defendant was impotent or, unknown to the plaintiff, was suffering from an infectious venereal disease or from leprosy or epilepsy.

Divorce is granted on various grounds, among which may be noted cruelty, sentence to a term of at least two years' imprisonment for a crime which is dishonouring in the opinion of the public, or lunacy which has continued for three years when there is no real prospect of permanent recovery. But there is another avenue to divorce which is easier, and, as many will think, too easy. If the husband and wife agree to be separated because their temperaments are incompatible they can get an order of separation which can be converted into a divorce after two and a half years or, on some conditions, even sooner. The joint estate is then divided.

As regards property the rule is that there is community, but either of the spouses or both may have separate estate. The new law does away with the position as predominant partner formerly enjoyed by the husband. Under the new system either spouse can dispose of what he or she has contributed to the community, but this right is subject to a good many limitations. When the marriage is dissolved by death the surviving spouse remains in possession of the joint estate till death or remarriage. When there are children or issue of children surviving the father or mother can dispose by will of one-third only of his or her estate.

F. P. W.

The Schuster Library of Comparative Law.—Dr. Ernest Schuster, K.C., LL.D., who died on December 10, 1924, bequeathed his library to the Society of Comparative Legislation. Early in 1925 the Society decided to transfer its library, including the Schuster bequest, to the London School of Economics and Political Science, where it is now housed on deposit. The School has devoted a special section of shelving to this collection, located in the gallery of the old general reading-room, in which both the School's general law library and the Edward Fry Library of International Law are to be found. Since the deposit of the Schuster Library the School has undertaken binding of the books wherever necessary and has made arrangements for continuing the subscriptions to a number of important periodicals falling within the scope of the collection. Furthermore, the books on foreign and comparative legislation already possessed by the School have been transferred to the same shelving in order that the Schuster Library should be as complete a unit as possible. Numerous items which formed part of Dr. Schuster's own library but which, strictly speaking, do not come under the heading of comparative law, have been appropriately labelled as part of the Schuster collection but are located according to their subject in the general classification scheme of the School's library.

The Schuster Library now contains about 800 treatises, 700 volumes of periodicals and several boxes of pamphlets. It is particularly strong in German law, but every effort is being made to strengthen its stock of works on the legislation of other countries in order that it may become a truly representative collection. At the present time there is an alphabetical author-catalogue on cards, but full attention has been given to the collection in preparing the entries for the subject-catalogue of the whole library of the London School of Economics which is now being compiled and will in due course be published. In order, however, to make the use of the Schuster Library as practicable as possible an additional card-catalogue, by countries and subjects, is to be prepared and will be located in close proximity to the books themselves. Any readers who require further information should address their inquiries to any member of the library staff, who will be pleased at all times to assist visitors in their research. The use of the library is available to all properly accredited members of the public, who may wish to consult any of its contents.

Amongst the more important and valuable possessions of the Schuster Library are the following :—*Entscheidungen des Reichsgerichts in Civilsachen* (complete series 1880 to date, still in progress) ; *die Rechtsprechung der Oberlandesgerichte auf dem Gebiete des Civilrechts* (1900–22) ; *Vergleichende Darstellung des deutschen und ausländischen Strafrechts*—a series of sixteen volumes (1906–9) ; *Annuaire de législation française* (1882 to date, in progress) ; *Annuaire de législation étrangère* (1871 to date, in progress) ; and the latest editions of Staub (*Kommentar zum H.G.B.*, and Staudinger (*Kommentar zum B.G.B.*).

The programme which we have set before ourselves at the London School of Economics is to endeavour to increase the usefulness of the Library, and we are proposing to do this by taking one country at a time. The position as regards German books is, on the whole, very satisfactory, and we certainly have the best collection of German law books in England. Our collection of French books is also probably the best to be found in London, but we are rather weak as regards the law of the other Latin countries. I have, therefore, decided to make a special effort to obtain a satisfactory series of Italian law books and I hope that very soon we shall be able to say that the position as regards Italian law is also satisfactory. I hope the Society will use its influence with any possible donors of books of this kind.

H. C. GUTTERIDGE.

Anales de la Facultad de Ciencias Jurídicas y Sociales de la Universidad de la Plata, 1926.—We have received with much appreciation the first number of the *Anales* issued under the able editorship of Dr. Enrique Ruiz Guiñazú. If the succeeding numbers equal the first in quality, the publication should have a long and useful life. We imagine that it takes the place of the *Revista* of the same name which seems to have ceased its existence.

Naturally such a review is concerned with internal as well as external affairs, but a fair space is given to international matters. Thus Dr. Eduardo Williams has a short article on uniform legislation on bills of exchange, a subject which is in the vigorous hands of the International Chamber of Commerce (Paris Headquarters). Dr. C. A. Alcorta has a useful article on the nature and grounds of extradition. The subject of Unfair Competition is treated by Dr. Enrique Gil: This is a burning subject at present, and includes much more than the infraction of the recognized monopolies protected by special laws. The monopolies [1] which the cartels, trusts, rings, etc., themselves protect constitute nowadays a more urgent problem and require separate treatment, particularly in their international aspects.

But apart from international matters, there are other articles of considerable moment; and among these we would select "The rôle of Jurisprudence among the Subsidiary Sources of Law in the Argentine," by Dr. L. Mendez Calzada. Should decided cases form a rule of law, *i.e.* should the Courts legislate and precedents be followed in subsequent cases, or in less excessive terms, should the interpretation placed by one Court on disputed law be binding on another? It is well known that Courts outside the Anglo-Saxon system feel themselves at liberty to disregard precedents. We recently, however, took note of the tendency in Chile of repeated decisions of the Courts of Appeal to form binding precedents. That is a tendency that is likely to reappear in other countries, for a Court of Appeal will rarely disregard its own decisions and specially

[1] Referred to by Dr. J. J. Diaz Arana.

true is this of Courts of Cassation; and yet this has occurred in France (p. 68) in well-known *revirements*, and in the practice of the Supreme Court of the United States of America. It is thought by many that in English jurisprudence the decisions of Courts of First Instance are too slavishly followed and that greater boldness would often lead to better law. What would the draftsman of the Law of Property Act, 1925, say to this?

Of the internal matters we note that at last a serious effort is being made to reform the Civil Code, which certainly wants it, but not more it may be than similar codes in the Sister States. Some special defects are mentioned by Dr. J. E. Rébora and by Dr. E. R. Elguera, who complains of the condition of building leases owing to the defective law of the surface.

WYNDHAM A. BEWES.

The Revival of Readings.—The Masters of the Bench of the Honourable Society of the Middle Temple have decided to revive the ancient practice of Reading. The first recorded Reference to a Reader in the books of the Inn was in the year 1501. The Readings, which were a means of instructing the students, were continued until 1642, when they were interrupted by the Civil War. For a time they were revived at the Restoration and finally fell into abeyance in 1680. The Reading delivered on May 19, 1927, has been published by the Society. It was delivered by Mr. Justice McCardie, who took as his subject "The Law, The Advocate and the Judge." The occasion was one of exceptional historical importance and the learned Judge's Reading (which is published by the Solicitors' Law Stationery Society) deserves to be studied by members of both branches of the legal profession throughout the world.

Judicial Salaries in the United States.—It is interesting to notice that in the United States within the last few years judicial salaries have everywhere been increased. The statistics are collected in a report of a committee which was presented to the American Bar Association at the meeting in Buffalo in September 1927. The Chief Justice of the Supreme Court of the United States now receives $20,500 a year and each of the associate justices $20,000. This is less than the salary of the seven justices of the Supreme Court of New York, who get $25,000 a year. The salaries of the judges of the Supreme Courts of the States vary widely, from $4,800 in S. Dakota to $25,000 in New York. Compared with the incomes made in America by successful lawyers the salaries of the judges are still very low. It is always difficult to persuade Congress to grant adequate salaries for work which requires special intellectual gifts.

Ibero-American Institute of Comparative Law.—We have received a copy of the Statutes of this body, which is specially concerned with Spanish, Portuguese and Ibero-American law. It proposes, among other things, to publish an official Review.

Napoleon as a Codifier.—Mr. Pierre Crabites, one of the American judges of the Mixed Courts in Egypt, has been going through the sixteen volumes of *Locré* with the view of determining Napoleon's personal share in the preparation of the Civil Code. *Locré's* work consists mainly of the *procès-verbaux* of the commission of four—Tronchet, Bigot-Préameneu, Portalis and Malleville, who drafted the articles and of the discussions of these drafts in the *Conseil d'État*, over which Napoleon presided. *Locré* is constantly cited in French Courts as a guide to the interpretation of articles in the Code, though by our stricter and perhaps less reasonable rule, evidence of this kind would be inadmissible.

Mr. Crabites, writing in the *Journal* of the American Bar Association, comes to the conclusion that upon many points Napoleon made his personal will prevail in the *Conseil d'État*. He was certainly present at 74 out of the 160 meetings, and may have been at others, as the *procès-verbaux* do not give a list of the members present at each meeting, though they give the names of the speakers. Napoleon's interest was particularly shown in all questions concerning paternity, adoption, marriage, divorce and succession.

Administration of Justice Act, 1920.—It is officially announced that, in view of the provisions of Part II of the Administration of Justice Act, 1920, which provides for the enforcement in England, Scotland or Ireland of judgments obtained in any parts of His Majesty's Dominions outside the United Kingdom or in any territories under His Majesty's protection to which the Act extends, the Legislature of St. Helena has made reciprocal provision for the enforcement therein of judgments obtained in the High Court in England, the Court of Session in Scotland and the High Court in Ireland, and an Order in Council has accordingly been issued extending Part II of the Act to St. Helena.

The operation of the above-mentioned Order in Council is confined to England, Scotland and Northern Ireland. Similar provision has not been made in the Irish Free State.

Maintenance Orders.—It is officially announced that an Order in Council has been issued extending the Maintenance Orders (Facilities for Enforcement) Act, 1920, to the Territory for the Seat of Government of the Commonwealth of Australia.

The Act provides for the enforcement in England and Ireland of Maintenance Orders made by a Court in any part of His Majesty's Dominions outside the United Kingdom, or in any British Protectorate to which it extends, and by Ordinance No. 9 of 1927 of the Territory for the Seat of Government of the Commonwealth of Australia reciprocal provision has been made for the enforcement therein of Maintenance Orders made by Courts in England and Ireland.

The operation of the above-mentioned Order in Council is confined to England and Northern Ireland and similar provision has not yet been made as regards the Irish Free State by the Government of that State.

NOTICES OF BOOKS.

A TREATISE ON THE SCIENCE AND ART OF GOVERNMENT.[1]

Sir John Marriott's treatise has a double claim on attention, not only as an authoritative textbook for the student, but also as a practical and comprehensive work of reference for the man of affairs. It is of great advantage that an elaborate work on such a subject should have been written by an author who brings to his task qualifications derived both from an academic and a political career—an Oxford lecturer who has devoted a great part of his life to the study and teaching of history and political science, and a practical politician who has seen many years of active service as a member of the House of Commons. The student will find the working of British parliamentary institutions expounded by one whose practical experience gives vividness and actuality to his description and analysis: the politician will gain fresh insight into the true character of the institutions with whose daily operation he is familiar by being enabled to realize the long process of historical evolution of which they are the result.

While the United Kingdom is the "modern State" whose institutions are chosen for detailed description, the characteristic qualities of the British Constitution are explained and illustrated by comparison and contrast with the constitutions of other countries. The scope and method of the work can best be indicated by the following quotation from the preface:

> The primary purpose of this book is to set forth the actual working of the English Constitution. Its method is mainly analytical; but no one can apprehend the genius of an historical constitution from mere analysis. I have, therefore, traced the historical evolution of the principal organs of the body politic, both as they function in England and in the British Dominions. With constitutional history and political analysis there mingles also a certain amount of political philosophy; for neither philosophy nor history can yield their appropriate fruit unless cultivated in close conjunction. The method adopted in this work is indeed the outcome of a strong conviction that the political institutions of any one country cannot profitably be studied in isolation. Accordingly, to the main body of this work short studies are prefixed of three types of "Democracy" which severally present a sharp contrast with each other and with the parliamentary type of Democracy gradually established by a prolonged process of evolution in this country.

[1] *The Mechanism of the Modern State.* By Sir John A. R. Marriott. 2 vols. Vol. i, pp. xxiii + 596; vol. ii, pp. xii + 595. (Oxford: The Clarendon Press. 42*s.* net.)

The three types of democracy which are specially selected for the purpose of contrast with the parliamentary type as established in the United Kingdom and the Dominions are "Direct Democracy" as exemplified in the City-States of ancient Greece, "Referendal Democracy" as existing in Switzerland under the constitution of the Swiss Confederation and "Presidential Democracy" as developed in the United States of America. But the constitutional arrangements of many other countries including France, Germany, the Netherlands, Belgium, Norway and Sweden are also referred to on different points for the purpose of comparison or illustration.

Sir John Marriott tells us that the scope of his book "is limited, somewhat strictly, to the machinery of government as formally constituted." Many readers will probably regret the degree of strictness shown in adhering to this limitation, and will welcome the author's occasional excursions beyond the frontiers of the subject as thus marked out. A short section is devoted to the evolution of English parties and party organizations, but nothing is said of the relations between Parliament and the Press, and only passing reference is made to the political significance of the Trade Union movement. But the formal machinery described is not only parliamentary machinery. The book includes valuable sections dealing with the historical development and existing organization of the Civil Service, the Departments of State, the Judiciary, and local government; and it is natural that with such a wide field to cover the author felt the necessity of excluding from his survey institutions which, however powerful they may be as extra-constitutional factors in governing or influencing the operation of the machinery of state, do not themselves form part of that machinery.

The book may in some sense be regarded as a manual for constitution makers, and it certainly deserves a prominent place on the shelves of all who may be called upon either to draft new constitutions or to develop or adapt existing constitutional machinery. But, in spite of the suggestion implied in the title which he has chosen, the author lays constant stress on the principle of organic growth, as applied to constitutional development, and the book contains many significant warnings against rash attempts to transplant wholesale to an alien soil institutions which owe their character and success to the natural genius and environment of the country which has given them birth.

In dealing with the Swiss Confederation the author says: "The first lesson to be derived from a study of Swiss Democracy tends to reenforce one of the oldest maxims of political science, the relativity of all its conclusions. There is no absolutely best in constitutions; the best constitution is that which has been gradually evolved by the people who live under it, and which is most closely adapted to their circumstances and conditions." In the context he quotes Napoleon's aphorism, first enunciated in reference to Switzerland:

"Une forme de gouvernement, qui n'est pas le résultat d'une longue

série d'évènements, de malheurs, d'efforts, d'entreprises de la part d'un peuple, ne prendra jamais racine."

Descending from the general to the particular he says as to two constitutional expedients which, owing to their apparently successful application in Switzerland, are often advocated as suitable for adoption elsewhere :

> Whatever may be said for or against the *Referendum* and the *Initiative*, this cannot be denied : that in Switzerland they are native products ; they are devices which have been engrafted on to the Federal Constitution after prolonged and varied experiments in the laboratories of the cantons ; they are in complete harmony with the " spirit of the Polity," and they are employed by a people who have had the advantage of a long apprenticeship in the art of self-government.

In the case of British Parliamentary Democracy, which is the book's central theme, a similar warning is enforced both by the history of its gradual evolution in the course of centuries, and by the emphasis laid on the peculiar character of its institutions.

> The British Constitution has [says Sir John Marriott] during the last hundred years been extensively copied—in some cases with disastrous disregard for the presuppositions which alone rendered its success possible in the country of origin. Parliamentary Government is of all forms of Constitution the most delicate in its adjustments and, therefore, the most easily thrown out of gear. Depending, for the most part, upon conventions ; perpetually adapting itself to new conditions, social and political ; subject to continuous modification in detail, it demands from those responsible for its working unceasing vigilance, a clear apprehension alike of practical conditions and of philosophical implications ; above all, it demands a reverence, almost religious in character, for the inner spirit which has inspired and still informs it.

This passage deserves respectful attention, not only in foreign countries, which have sought to mould their institutions on the British model, but also in British Dominions, whose citizens, though entitled for the most part to regard British parliamentary institutions as part of their natural inheritance, have to work them under conditions very different from those which still prevail in Great Britain itself, and may find it difficult to safeguard in a novel environment the continuity of a tradition the fundamental implications of which are thus eloquently stated.

The book includes chapters dealing with the constitutions of three of the Dominions—Canada, Australia and South Africa. Oversea readers will regret that—apart from a short historical account in each case—Sir John Marriott has confined himself in the main to a summary of constitutional provisions, and has not been able to go further and tell us what special tendencies he discerns in the development of the British system of parliamentary democracy as established in these younger States.

The chapter on the "Machinery of Imperial Co-operation" was written just too soon to allow of any reference being made to the important results of the Imperial Conference of 1926. But this unavoidable omission will no doubt be remedied in future editions.

R. FEETHAM.

INTERNATIONAL LAW.[1]

THIS book, we are told by the author, has had a somewhat curious history. It began as a primer in 1899 during the first year of the author's practice at the Bar while he was "still waiting for briefs." It passed through several successive editions at the hands of the author between 1902 and 1911. In 1918 a fifth edition prepared by Dr. Coleman Phillipson was brought out and now a new and considerably larger edition by Mr. Moelwyn-Hughes is offered to the public. The Earl of Birkenhead will be remembered as Mr. F. E. Smith the author, in collaboration with Mr. Sibley, of a book entitled *International Law as Interpreted during the Russo-Japanese War* (1905) and of *The Destruction of Merchant Ships under International Law* (1917). How much of the present edition of the book here reviewed represents the contribution of the Earl of Birkenhead and how much that of its successive editors it is impossible to determine without comparing it with the last edition prepared by the author himself, since no brackets or other signs are employed to indicate the new matter added by the editors. It is quite clear, however, that the book in its present form is in large measure the work of the editors. Included in the new matter of the present edition are the chapters on the League of Nations and the Permanent Court of International Justice, while the chapters dealing with blockade and contraband have, we are told, been rewritten in the light of the practice of the World War.

There will be general agreement that the editor of the present edition has performed his task in an admirable manner. It bears the earmarks of thoroughness, carefulness, extensive research, and familiarity with the law and practice regarding the subjects discussed. From an elementary manual the book has grown into a treatise of considerable volume and is packed with a mass of facts the wealth and variety of which are excelled by few, if any, introductory treatises on international law. Historical illustrations are abundant and apparently no important judicial decision has been overlooked, although naturally for want of space it has not been possible to discuss fully many cases which otherwise would have received more detailed consideration.

The point of view of the editors (or author) throughout is eminently fair and judicial and there is little in the text dealing with German conduct during the war that even a fair-minded German sympathizer could criticize as unfair. In this respect the book differs markedly from

[1] *International Law.* By the Right Hon. the Earl of Birkenhead. Sixth edition. Edited by Ronw Moelwyn-Hughes. (J. M. Dent and Sons, Ltd., London and Toronto, 1927. Pp. xxvi + 460.) 21*s.* net.

certain other treatises that were written during and immediately following the war when the opinions even of jurists were coloured by the prejudices and passions which affected the minds of all who then wrote books about international law and the World War.

Regarding the nature of international law, the author, apparently, is inclined to sympathize with the Austinian view; at any rate, he says, "it is by no means clear that the objections of Austin can be dismissed as pedantic" (p. 9). As to the differences between international law and municipal law, there is, we are told, an "impassable gulf which divides them" and it would be blinding our eyes with the dust of unrealities to ignore them (p. 10). On various controverted questions discussed by the author (or editors) there will naturally be some dissent from the conclusions expressed, but on the whole the reviewer is disposed to believe that they are sound and supported by the preponderance of juristic opinion and international practice. Such are their conclusions that the doctrine of equality of States is largely a fiction which has little correspondence with the facts of international life (p. 48); that the League of Nations is not a State, much less a superstate, but is merely a union of States—an international person, *sui generis* (p. 61); that if the views regarding the Monroe Doctrine put forward by President Cleveland and his Secretary of State, Olney, at the time of the Venezuela boundary dispute, should become a part of international law "the doctrine of equality may be banished from our textbooks, to be replaced by a legal hegemony on the part of the United States over the whole of the American Continents" (p. 86); that the practice followed during the World War demonstrates beyond doubt that the distinction between the armed forces and the civilian population, for certain purposes at least, is in danger of disappearing (p. 205); that if the principle of the immunity of private enemy property from capture at sea were adopted as a rule of international law a maritime power possessing a powerful fleet would be left with very little if any advantage over a country with a small fleet, or none at all (p. 264); that in the present state of international public opinion there is little likelihood of a general agreement for the abolition of the existing right of capture at sea (p. 269); that while all the measures adopted by the Allied Powers for the blockade of Germany may not be generally acceptable, it may be safely assumed that the broad general policy pursued will be followed in the next war by naval belligerents "to the fullest extent compatible with continued diplomatic relations with neutral States" (p. 394); that the submarine as a weapon of war has come to stay and that it may be doubted whether the rules laid down in the Treaty of Washington (1922) relative to the outlawry of the submarine will be generally followed in the next naval war (p. 395); etc.

It is inevitable that there should be some errors of statement in a book containing so vast a mass of facts as this one does, but it is a tribute to the carefulness and accuracy of the authors to say that the present

work is remarkably free of errors of this character. The reviewer has noted several which may be mentioned: the date of the Treaty of Paris is of course 1856, not 1836 (p. 34); the *entire* control of foreign relations in federal unions is not necessarily nor always in fact surrendered by the component States to the central government (p. 40); Lord Sackville was not *Ambassador* to the United States in 1888, but *Minister* (p. 70); the peace treaties of 1919 did not in all cases confer the nationality of the annexing State on all the inhabitants of the territories annexed (p. 296), e.g. the German inhabitants of Alsace-Lorraine.

The book, it may be added, is furnished with a detailed table of contents, an excellent index, a list of cases cited and a brief but select bibliography, all of which add to its usefulness as a textbook for students. Altogether, we believe, it will take its place among the more useful, accurate, informing and up-to-date introductory treatises on international law that have appeared since the World War. In making it available, the author and editors have placed teachers and students of international law under distinct obligations to them.

James W. Garner.

University of Illinois.

PRIVATE INTERNATIONAL LAW—NON-TERRITORIAL JURIDICAL SYSTEMS—*RENVOI*—*FRAUDE À LA LOI*.[1]

In spite of the number of excellent works on Private International Law this book is very welcome, and we look forward with anticipation to the second volume. We hope that in it M. Arminjon will be liberal of his references to the latest decisions of the French courts. It is difficult for foreign lawyers to keep abreast of French *jurisprudence*, but owing to the excellent French system of annotating the cases as they come out, the latest case upon any point gives the clue to the previous cases, and also to the discussions of the writers.

This first volume which lays down the fundamental principles is necessarily somewhat abstract, though it is far from being arid.

M. Arminjon's book has some novel features which deserve careful consideration. He looks at the whole subject from a different angle. Having spent many years in Egypt as professor of International Law in the Royal School of Law and later as a judge of the Mixed Courts, he has been led to look at conflicts of laws from an oriental point of view.

To an Englishman or a Frenchman it is natural to consider the subject as concerning the application of the laws of different *countries*. There is only one juridical system in England or in France. But in many parts of the world, and notably in the territories which form, or formed till recently, part of the Turkish Empire this is not so.

In Egypt, for example, there are some 16 juridical systems to one or other of which an Egyptian is subject as regards his "personal law."

[1] *Précis de Droit International Privé*, 2nd ed., vol. i, v, 1, by P. Arminjon, Paris, Dalloz, 1927, 35 francs.

The work of Mr. Goadby which we reviewed recently deals with a similar state of things in Palestine.[1]

In countries where such systems of personal law exist conflicts of laws strictly analogous to those with which we are familiar occur continually in cases between parties who are both natives of the country, but belong to different religious communities. There is what M. Arminjon calls a *droit international privé interne*. This singularly infelicitous designation points to the fact that private international law is itself a misleading term. It has no connexion with international law in the true sense. "Conflict of Laws" is better. "Choice of Law" would be better still. The scope of the subject is strictly limited. It does not embrace the laws which determine how nationality and domicile are acquired or lost, or those which fix the legal position of resident foreigners, though many books of private international law contain this matter. Private international law, if we must retain the name, is a branch of the private law and consists solely of the rules according to which the Courts of a particular juridical system decide whether they shall apply to the matter before them the law of another juridical system instead of their own law. These rules M. Arminjon calls *règles de rattachement*, instead of employing the more usual term, *règles de solution des conflits de lois*. But by whatever name they are called these rules have nothing international about them. In most countries they rest partly on legislation, partly on custom. For instance, in England the Bills of Exchange Act lays down the rules as to bills, whereas most of our rules are customary. But in any case the rules do not depend upon deference to a foreign sovereign or to a supposed *comitas gentium*, nor do they depend on any such community of law between civilized States as was fondly imagined by Savigny. They rest ultimately upon the views of justice and equity which prevail in the *forum*, where the case has to be decided. If the Court of a particular community—we avoid the word State or country in deference to M. Arminjon's argument—decides not to apply its own law, this is because it considers that to apply the law of the *forum* would be unjust or inexpedient.

It is for each community to decide to what persons and to what legal relations its law shall apply. The history entirely supports M. Arminjon's view. The rules which we call private international law owe their origin in the main to conflicts of laws within the bosom of a single State, such as those between the different Lombard cities, the different *coutumes* of ancient France or the different laws of the United Provinces of the Netherlands. In France and Holland the juridical systems were territorial and not personal, as they had been at an earlier period in Europe, and still are in oriental countries; but this does not affect the argument.

In England there was nothing at all analogous. Certain local peculiarities formerly existed, such as the law of *legitim* and *jus relictæ*

[1] See *Journal of Comparative Legislation*, Third Series, vol., 9, part 1, p. 145.

in the province of York, in Wales, and in London as to freemen, and there were special tenures like borough English and gavelkind till the other day. To a very limited extent Jewish law is recognized. The validity of Jewish marriages in point of form is settled by Jewish law, though not the capacity of the parties.[1] But these things fall far short of separate juridical systems. It is this ancient unity of the English law which makes it so natural for us to regard private international law as necessarily concerned with the application of a *foreign* law. Thus, Westlake's classical work[2] begins by saying that this branch of law "arises from the fact that there are in the world different territorial jurisdictions possessing different laws," and the editor's note reads rather quaintly "the existence within one territory of different juristic systems having different laws. . . . falls also within the scope of the subject."

By eliminating all ideas of sovereignty and of territory M. Arminjon puts all this in a much clearer light. There are of course eminent writers who insist that private international law is concerned only with conflicts of sovereignty and would exclude those conflicts of laws which arise in countries like Egypt and Palestine, between the various personal systems, but we do not think their arguments for thus limiting the scope of the subject are at all convincing.[3]

In any new book on private international law one turns naturally to see what is said about the *renvoi*. No legal question during the last generation has stirred up so much passion, and there is already a vast literature on the subject. As is well known this is one of those cases—familiar enough to French lawyers, but so foreign to our ideas—in which there is a conflict between the *doctrine* and the *jurisprudence*. In the Courts the theory of the *renvoi* appears to be firmly established.[4] On the other hand the great majority of the authors are against it, though some of them make important reservations.[5] M. Arminjon's treatment of this subject is one of the best parts of his book. He rejects the *renvoi* except in one or two very special cases. He would welcome the *dictum* of Russell J. in *In re Annesley* [1926] 1 Ch. 692, a most instructive case in which the learned judge, while applying the *renvoi*, deals it one of the shrewdest blows that it has received in recent years. "When the law of England requires that the personal estate of a British subject who dies domiciled, according to the requirements of English law, in a foreign country shall be administered in accordance with the law of that country, why should this not mean in accordance with the law which that country would apply not to the *propositus* but its own nationals legally domiciled there?"

This view is strongly supported by Sir F. Pollock.[6]

[1] See *In re De Wilton, De Wilton* v. *Montefiore* [1900], 2 Ch. 481.

[2] *Private International Law*, 7th ed. p. 1.

[3] See *e.g.* Pillet et Niboyet, *Manuel de Droit International Privé* (1924), p. 329.

[4] Rennes, 24 juillet, 1924, Clunet, 1924, 410.

[5] See for a recent criticism the article by M. J. Perroud in Clunet, 1925, p. 656.

[6] *Law Quarterly Review*, 42, 435.

Prof. Berriedale Keith in a note on *In re Annesley* in the last edition of Dicey says: "It must however be remembered that this simple rule would not work in the case of persons domiciled in oriental countries." [1]

But why not? Suppose the case of the succession of an Egyptian national who belongs to the Greek Orthodox Church. English law says it is governed by Egyptian law. But there is no uniform law of succession for Egyptians. The Egyptian law *quoad* the *de cujus* is the law of the Greek Orthodox community. The English court can discover what this is, and apply it without dragging in the *renvoi*. The case is not that the Egyptian law designates another law. The Egyptian law for this man's succession is his personal law, which happens to be the law of the Greek Orthodox Community.

And without venturing into the stricken field of the *renvoi* it may be suggested that its firm hold in the French decisions is due not a little to the rule of the French law, which seems to us unreasonable, that a foreigner never acquires a legal domicile in France, though for many purposes the *domicile de fait* is recognized.[2]

In the famous *Forgo* case, in which the theory of the *renvoi* was first accepted by the *Cour de Cassation*, the *de cujus* who was of Bavarian nationality had lived in France from the age of five till his death at the age of sixty-eight. What could be more natural than that his moveable succession should go according to French law? But to reach this equitable result the French court had to employ the *renvoi*.[3]

Another topic of great interest which is discussed acutely in this book is the theory of fraud upon the law—*fraude à la loi*.

Without speaking of other cases, it is generally agreed in France that a decree of nationalization in a foreign country obtained solely in order to elude certain fundamental prohibitions of the French law cannot be invoked in a French Court.[4] This is an old theory of the French law which was applied in the days of the *coutumes* in certain cases where parties had attempted to evade the provisions of their own *coutume* by going into another territory.[5]

The Fiume divorces are a good illustration. In Italy, where divorce is not possible, Fiume was for a few years a recognized divorce market, as South Dakota used to be in the United States. Italians got naturalized in Fiume, obtained a divorce and then in many cases got renaturalized in Italy. Some 15,000 Italians were divorced in Fiume between 1920 and 1922.[6] This comedy was ended by the annexation of Fiume. It is this kind of thing which French law calls *fraude à la loi*. M. Arminjon would

[1] *Conflict of Laws*, 4th ed. 823.

[2] See Pillet et Niboyet, *Manuel*, p. 275.

[3] Dalloz, 1879, 1, 56.

[4] Dalloz, *Répertoire Pratique* v. *Nationalité*, n. 334; Aubry et Rau, 5th ed., 1, s. 74, note 16; Montpellier, 19 fév, 1900, Dalloz, 1901, 2, 27.

[5] See article by M. Niboyet, on *Fraude à la loi* in *Revue de Droit International*, 1926, 485. Cf. *Revue Trimestrielle*, 1927, p. 190.

[6] Clunet, 1922, p. 880.

restrict it within very narrow limits. In English law it is quite doubtful if any case exists in which the Courts would rely on this ground. Dicey suggests that it is doubtful whether the change of a minor's home by a parent if made for a fraudulent purpose changes the domicile of the minor.[1]

However this may be, it is pretty certain as to persons of full capacity that when the intention to change the domicile is proved the Courts will not try to go behind this and inquire into the motive. This has been definitely settled in Scotland.[2] And in England in *Drexel* v. *Drexel* [1916] 1 Ch. 251, Neville J. held that a husband had abandoned his English domicile by residence in France, though he had settled there merely to get a divorce.

We may remark that *fraude à la loi* is much less likely to occur under a system like ours where domicile and not nationality supplies the governing rule. Most people are unwilling to acquire a permanent home in a foreign country even for the purpose of getting a divorce.

Change of domicile in the English sense of that term requires to be clearly proved, and such cases as the Fiume divorces could hardly occur. Probably few, if any, of the parties to them had a permanent home in Fiume.

M. Arminjon's book is to be heartily commended to the attention of all students of the subject.

F. P. Walton.

THE HAGUE ACADEMY OF INTERNATIONAL LAW.[3]

A notice of the *Recueil des cours* of The Hague Academy for the years 1923 and 1924 appeared in the February number of this *Journal*[4] and the volumes containing the lectures given in 1925 have now come to hand. In quality, in range, and in practical utility they maintain the standard of the preceding volumes.

History is represented by M. Goyau's course on *L'Église Catholique et le droit des gens*, by M. Boegner's *L'influence de la Réforme sur le développement du droit international*, by M. Van der Vlugt's *L'œuvre de Grotius et son influence sur le développement du droit international*, and M. Guani's *La solidarité dans l'Amérique latine*.

More purely legal problems are dealt with by the late Mr. G. G. Phillimore in his *Immunité des états au point de vue de la juridiction ou de l'exécution forcée*, and by Baron Heyking in his *L'exterritorialité et ses applications en Extrême-Orient*.

The increasing importance in international law of international debts

[1] *Conflict of Laws*, 4th ed., p. 420.

[2] *Carswell* v. *Carswell*, 1881, 8 Rettie, 901. Cf. *Stavert* v. *Stavert*, 1882, 9 Rettie, 519.

[3] *Hague Academy of International Law, Recueil des cours*, 1925. 3 vols. (Paris : Librairie Hachette.)

[4] See *Journal of Comparative Legislation*, Third Series, vol. ix, pt. i, p. 142.

and charges is illustrated by Dr. Strupp's *L'intervention en matière financière* and by M. Jèze's *La garantie des emprunts publics d'état.*

M. Charles de Visscher, who is a member of the League Commission for the Progressive Codification of International Law, contributes a most timely course on *Codification.*

Dr. Wehberg, who is one of the two leading authorities on the League in Germany, makes an exhaustive examination of the abortive Geneva Protocol ; though for the moment it is in abeyance, there is a widespread feeling that sooner or later some modification of it will demand public attention. Thus a critical study of its principles at the hands of an expert is of great value to those who are thinking out the new form which the interdependence of the principles of security, arbitration and disarmament will take.

M. Rapisardi-Mirabelli discusses *La théorie générale des unions internationales,* M. Pillet *La théorie générale des droits acquis,* and Mr. Arthur Kuhn *Les effets de commerce en droit international.*

Mr. Manley Hudson, who has made a special study of the Permanent Court of International Justice from its beginning, discusses its *Advisory Opinions,* and in particular examines the controversial question whether the Council of the League must be unanimous or not in requesting the Court to give an opinion.

Finally, and most important, the Vice-President of the Academy, M. N. Politis addresses himself to what most readers will regard as the crucial point in the present phase of the development of international society and law, namely, *La problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux.* His examination of the gradual encroachment of international law upon *le domaine réservé* (the " matters of domestic jurisdiction " of the Covenant) and of the nature and contents and inconvenience of this sacred territory is most instructive, and is further developed in his book *Les nouvelles tendances du droit international* published this year. His combination of the academic and the diplomatic careers and his intimate connexion with the League as a former member of the Council and in other respects have qualified him in a peculiar degree to observe and explain the inner meanings of the modern development of international society and its law.

ARNOLD D. MCNAIR.

INTERNATIONAL PRIVATE LAW.[1]

A SECOND edition of Dr. Hibbert's book has now appeared. To compress so bulky and so complex a topic as this into 229 pages is a formidable task, and involves a degree of condensation and simplification which is apt to be misleading. For instance, take the following statement : " See *Janson* v. *Dreifontein Consolidated Mines, Ltd.*, where it was held

[1] *International Private Law.* W. Nembhard Hibbert. Second edition. (University of London Press. Pp. xl + 237.) 10*s.* 6*d.* net.

that after the restoration of peace an alien who was an enemy during the war could sue on a contract made before the commencement of the war." The real point of this decision, as elucidated in the Great War, is that a right of action for breach of contract had occurred to the alien before the outbreak of war, and was therefore enforceable by him after the war; whereas the reader is apt to get the impression from the statement quoted, that any pre-war contract with one who becomes an alien enemy is enforceable after the war. A skilled reader would know what the author means, but the student would probably not. We do not doubt that students preparing for examinations derive assistance from this work, but they must bear in mind that a summary so condensed as this must be read with caution. The title-page is dated 1927, and the author's preface 1926. This proleptic tendency which publishers share with the manufacturers of cars is apt to do injustice to authors and editors, and should be resisted.

ARNOLD D. MCNAIR.

CONFLICT OF LAWS.[1]

THE fourth edition of a book so well established as this one does not call for any extended review.

Professor Berriedale Keith, who assisted Dicey in the preparation of the two preceding editions, is solely responsible for this one, and the book bears every sign of having been brought up to date with scrupulous care and sound judgment.

In the brief Memoir which Dicey left unfinished he said that he could claim "neither to have achieved any marked results by the labours of his life nor to recognize in himself any intellectual gifts not generally shared by other Englishmen." The remark was characteristic but untrue. It was not due to the low spirits of an old man, though he was eighty-seven when he wrote it. Dicey seems to have lost earlier than most men the power to enjoy success. When he was elected a Fellow of Balliol he wrote to his wife: "I cannot help remembering the time of my life when to have been elected a Fellow of Balliol would have seemed to me like admission to Paradise. It is rather sad, as one lives on, to observe how things come when one has ceased greatly to care for them." Yet at that time he was only fifty-one.

But surely a professor of law who, not to speak of many other writings of great merit, has produced two books in different branches of the law, each of which has become a classic and is well known in every part of the world where English law is studied, could not say with truth that he had not achieved any marked results. And, apart altogether from his books, Dicey, as Vinerian professor for a generation, played a large part in university life, and took a conspicuous share in the Home Rule controversy. As to intellectual gifts, no doubt "other Englishmen" have some

[1] *Dicey's Conflict of Laws*, 4th ed. By A. Berriedale Keith (London: Stevens and Sweet and Maxwell, 1927. Pp. 1056, £2 12s. 6d. net.)

" share " of the keenness and clearness of mind, the power of concentration and of unwearied application which distinguished Dicey, but are there many whose share of these qualities is equal to his ?

Of Dicey's two great books, the *Law of the Constitution* is the more original. Professor Pillet said of it, *On n'a jamais fait mieux dans ce genre, on n'a même jamais fait aussi bien.*

But the *Conflict of Laws* is more indispensable as a tool of the trade, and except Blackstone, it is probably better known on the Continent and in America than any other English law book. The present Vinerian Professor said of it that " it showed that Dicey was one of the greatest lawyers of his day."

The *Conflict of Laws* grew out of a book on Domicil of less than 400 pages published in 1879 in which Dicey had adopted already the method which he followed ever afterwards. This was to state the law in a series of rules, giving after each any exceptions there might be and a comment.

It is interesting to notice that in his inaugural lecture in 1883 as Vinerian Professor he defends law teaching in the universities by saying, " At the universities can be taught and can hardly, as things stand, be taught elsewhere, the habit of looking upon law as a series of rules and exceptions and of carefully marking off the exact limits of ascertained principles." One of the main differences between the English law and any continental system lies in the fact that the growth of English law has been on the whole—at least since Blackstone—very slightly affected by the teaching of professors of law, whereas abroad their share in shaping the law has been almost as great, if not quite as great, as that of the judges. The one branch of English law which owes a great deal to the professors is Private International Law. This is due largely to the fact that a young man who had only been for four years at the bar had the sagacity to see what a chance there was of bringing order out of chaos and had at the same time the ability and learning to take advantage of the opportunity.

If ever any law book was a *tour de force* it was Westlake's slim volume on Private International Law which appeared in 1858.

It is difficult for us to realize how vague and unsettled the whole subject was at that time. Westlake had read and had reflected upon the English cases and he had in addition studied with great care the chief continental writers on the subject, and especially Savigny. It was through him that the judges were led to pay due attention to the work of foreign writers.

In the chapter Dicey wrote in the *Memories of Westlake* he gives a good many illustrations to show how Westlake anticipated a great deal of law which is now settled by decision.

Dicey's own debt to Westlake he was always the first to proclaim. And though Dicey came into the field later and to a certain extent entered into Westlake's labours, he made for himself a position of his own, and his own book has exercised no inconsiderable influence on the law.

To Dicey one of the main attractions about Private International Law was that it was comparatively untouched by the legislator. He has a pregnant saying: "English law might be made lucid and would be in the main good if we had no statutes. It is not only, or perhaps mainly, that statutes are ill-drawn, though they are badly drawn, but that English judges seem incapable of recognizing a principle when once it is put into the form of an Act of Parliament." Of the cases decided since the previous edition of this book perhaps the most important is *In re Annesley* on the vexed question of *renvoi*. This case has been referred to in the review in the present issue of the work of M. P. Arminjon. F. P. W.

THE PRELIMINARIES TO THE REBELLION IN UPPER CANADA.[1]

This excellent study is the first of a series produced under the auspices of the Royal Colonial Institute. The purpose of the series is to assist "young students who are just entering the ranks of scholarship" by providing facilities, too often wanting, for bringing their early work to the attention of the historical world. The undertaking deserves wide support, for it frequently happens that the serious research of a young scholar is often lost, to the detriment of scholarship and worse still to his own discouragement. Dr. Aileen Dunham's book is a good beginning. As a Canadian she brings to her work local knowledge, local atmosphere and local insight. In this connexion the series makes an auspicious start. Graduate work in history is too often begun *in vacuo*—whether without the local background or without that provided by wide study in general history, or without both. We hope the series will continue to follow these lines.

Dr. Dunham traces with care and intimate knowledge the various movements in the life of Upper Canada after 1815, which culminated in the unfortunate and abortive, but none the less significant and fruitful rebellion of 1837. As we follow the history we are conscious of excellent historical writing, for Dr. Dunham succeeds with insight and scholarship and with fine organization of her material in disclosing to us the growth of a colonial political mentality and community life. It would be impossible to select many features in this cumulative effect for special emphasis; but we should like to draw attention to the admirable study of the growth of the conception of "responsible government," and to the best estimate of which we know of Sir F. B. Head's régime. Dr. Dunham writes with modesty in a clear, calm, moderate and practical style. It would be quite easy to point out weaknesses in form, but there is enough of wise restraint, of judicial balance and of good sense to promise well for the future.

We would make one or two complaints. Dr. Dunham has not thought it necessary to give separate emphasis to nonconformist disa-

[1] *Political Unrest in Upper Canada*, 1815–1836, Aileen Dunham. (Royal Colonial Institute, Imperial Studies, No. 1). (London: Longmans Green & Co. 1927). Pp. 210, 9*s*.

abilities. For example what was the position of Lord Campbell's Marriage Act ? Apparently it applied to the province under local legislation. If so, why were the Quakers included among those who regularly appealed against disabilities ? Again, Dr. Dunham appears to accept the conclusions of the Canada Committee of 1828 that the Clergy Reserves were a grave economic detriment. We believe this is an exaggeration drawn from the fact that political parties or factions in Upper Canada regularly made this statement as a party cry without much investigation. Again, Dr. Dunham does not appear to have worked at the Dalhousie MSS. at Ottawa, and thus she misses much of value in colonial policy. In all these connexions a serious question arises to which we invite the attention of the Royal Colonial Institute. If the Imperial studies are to be the best possible work of young scholars, some effort ought to be made on their behalf to see that they know of other workers in the same field. Had this been done, Miss Dunham would have been brought into contact with students in Canada, at present engaged in research on the Quakers, on the Clergy Reserves, on Dalhousie and so on. Before any more Imperial studies are printed some effort for creating a clearing-house is necessary.

Finally " imperial studies " cannot be written without thorough training in political philosophy, and in economic history. It is here that Miss Dunham is weakest. She fails to see clearly that Upper Canada from 1815 to 1836 is merely a microcosm of the colonial history from 1661–1774. She has not entirely grasped the implications of the political theory as seen for example in mercantilism. It is quite true that she is most careful to place in due perspective the position of the Executive in Great Britain during her period—a point far too often obscured ; but it is idle to forget that, in connexion with the Canadas, principles were laid down in 1810 and in 1826 which on the one hand go back to the American Revolution, and on the other touch the political principles of Lord John Russell. In other words, wherever before 1849 we study the politics of the Empire we touch the political theory of the unified State—and it makes little difference what the executive principle. Once more we hope that " imperial studies " of this nature will not be isolated from serious work in kindred subjects.

We congratulate Dr. Dunham on a book of excellent promise, distinguished by research and by objectivity of treatment. We hope that she will provide a study of the years 1836 to 1841. We congratulate also the Royal Colonial Institute on a great venture of faith, to which we wish every success. Dr. Dunham's study is a most promising beginning. It is well indexed, and there is a good bibliography. It is, however, a pity that she has not attempted to make some key for the series of transcripts from the Record Office which are at Ottawa. This would have been a great help to Canadian students. We miss too a reference to Egerton and Grant's *Documents*, containing as it does an excellent series of petitions relating to the proposed union of 1822.

W. P. M. KENNEDY.

HOUSING REFORM.

La Reforma de la Locacion Urbana y el Problema de la Vivienda, published by Restoy y Doeste, Corrientes 556, Buenos Aires, is a work by Dr. Adelqui Carlomagno, which deals with the letting of town houses, both in its legal and social aspects, setting forth the actual law and some desirable amendments.

The effects of the Great War on the housing problem were of course not confined to the belligerent nations and in parts so remote as the Argentine Republic it was found necessary to pass a temporary rent restriction Act which endured for two years.

An Act which applies to the country (No. 11, 170) was also passed but is not dealt with, since it has a character which is independent of and does not modify the Civil Code.

On the other hand No. 11, 156 (ss. 11, 122), which deals with town houses, does permanently alter ss. 1504, 1507, 1509, 1583, 1604 and 1610 of the Civil Code and the greater part of this book is directed to pointing out and criticizing the changes made and to suggesting omissions and imperfections which it would be well to rectify, and this is combined with frequent reference to parallel legislation in Brazil, France, etc., with some mention of English law.

The specific encouragement of small house-building is confined, as in many other countries, to towns (p. 7); while the special difficulties of housing occasioned by the customary letting of country farm lands has been rather neglected. The doubt whether the new law is constitutionally valid has been settled in the affirmative by two decisions pronounced in 1925.

Perhaps the most notable effect of the new law is to be found in its operation on the much criticized art. 1505, which prohibits all letting for longer than ten years, resulting in the practice of no time being named in the contract. Law 11, 156, meaning to prevent landlords raising rents under the after-war stress, makes all tacit terms into two years, so that lesser customary terms and those deduced from times of payment have been abolished. Certain rights of determining a statutory term are given and these (more simple than in England) are set out on pp. 213 ff.

It seems that a clause in leases excluding children had become common, but by some were considered among those designated as " unlawful, immoral and impossible." The new law has made such a clause void and inoperative—an example which was rejected by the French Senate in 1923, but which might well be copied here.

The payment of a premium to a tenant to leave is not among the prohibitions of the new law, but the author does not neglect this improvement entirely, since he mentions that the giving of key-money is definitely forbidden in Portugal. He does not mention the prohibition in our emergency legislation, nor the practice which was, and perhaps is, common in the poorer parts of London in the case of free houses.

On the whole this is an adequate and satisfactory treatise, and the only failure which we notice is that the texts of the laws referred to—which are short enough—are absent ; and this absence makes it difficult fully to appreciate the merits of the author.

WYNDHAM A. BEWES.

L'ÉTAT ACTIONNAIRE.[1]

THIS is a careful and competent study of that form of association by the State or by a public authority in some commercial or industrial enterprise in which the shares are held partly by the public authority and partly by private shareholders.

The nomenclature is at present rather unfixed, and in English there is no special name for this form of partnership. This is not surprising, seeing that with us it has hardly occurred except in a few cases, such as " British Dye-stuffs " and " British-American Nickel Corporation," in which the Crown holds shares through a trustee.

In the municipal field M. Lapie has discovered only one instance in England, viz. the case of a city owning shares in a drainage company. On the continent, however, this kind of participation seems to be spreading rather rapidly.

French writers call it a *société d'économie mixte*, or, more shortly, *société mixte*, and German writers use the term *gemischte private und öffentliche Unternehmungen*.

This kind of partnership presents problems both on the legal and on the economic side, and they are discussed with much good sense by M. Lapie.

F. P. W.

BILLS OF EXCHANGE.[2]

THE new edition of this standard work will be welcomed by the profession. Even the smallest of law libraries needs Chalmers on Bills.

The idea of codification of the common law makes little headway. Indeed it is doubtful whether there is as much feeling in favour of codification at the present time as there was thirty years ago. The fear of codification arises largely from ignorance of the actual working of the law in countries whose systems have been codified. The codes do not, as is often imagined, attempt to foresee the myriad combinations of facts which may present problems for the courts. They state merely the leading principles of the law. Nor do the judges interpret the codes in the narrow and literal manner in which statutes are construed with us. Very few lawyers who have lived under a codified system will deny its great convenience. As Sir Mackenzie Chalmers says : " All the continental nations have codified their laws and none of them shows

[1] *L'État Actionnaire*, by Pierre Olivier Lapie. (Paris : Dalloz.) 15 francs.

[2] *Digest of the Law of Bills of Exchange, Promissory Notes, Cheques and Negotiable Securities.* By Sir M. D. Chalmers. (London, Stevens, pp. 500. 25*s*. net.)

any signs of repenting it." But, although we have not followed this way, the last generation has seen a great deal of law codified in a different manner by Consolidation Statutes which go much more into details than do the foreign codes.

The Bills of Exchange Act, 1882, the Partnership Act, 1890, the Sale of Goods Act, 1893, and the Merchant Shipping Act, 1894, are notable examples of this kind of consolidation which, in the words of Sir Frederick Pollock, " makes the law more accessible without altering its principles or its methods."

In the United States the long and rapidly lengthening series of Uniform State Laws illustrate the same method.

The new Property Laws in England fall into a different category because they effect great changes in the law.

The peculiarity of these Consolidation Acts of which the Bills of Exchange Act is the type is that they weave into one web previous statutory enactments and the law settled by judicial decisions.

In this work of consolidation Sir Mackenzie Chalmers has played in England a leading *rôle*. He was the draftsman of the Bills of Exchange Act and also of the Sale of Goods Act, and the Bills of Exchange Act adopted almost word for word his Digest of the old law. The words chosen by Sir Mackenzie Chalmers to express the effect of the English decisions are now statute law in Great Britain and (with some modifications) in more than forty States and Territories of the American Union.

For many years serious attempts have been made to get a uniform law of Bills adopted by the chief commercial countries, and, but for the war, it is not impossible that an agreement might have been arrived at, at least among a good many of the continental nations.

The British delegates to The Hague Conferences in 1910 and 1912, of whom Sir Mackenzie Chalmers was one, and the delegates of the United States did not adhere to the Convention binding their respective Governments to enact the " Uniform Regulation," with which the delegates of thirty-one nations were satisfied. It may have been difficult for Great Britain and the United States to hold aloof, but they had good reasons for so doing. Uniformity of laws is a good thing, but like most other good things, it may be bought too dear. Both countries after much pains had got their law of Bills into good order, and there is now practically speaking one law on the subject for the whole English-speaking world.

Both lawyers and merchants know where they stand, and it would be a thousand pities to throw the law again into the melting-pot.

That the result attained by the Bills of Exchange Act is satisfactory is pretty clearly shown by the rarity of the reported cases. In spite of the vast number of bill transactions the annual Digests of the last few years have contained only some two or three decisions a year on bills and cheques, and these include Scots and Irish cases. None of the cases since the last edition of Chalmers in 1919 is epoch-making.

King v. *Boyd and Porter* [1] is rather interesting. The plaintiff had put a cheque away in a desk and forgotten all about it for three years when he presented it and payment was refused. It was held by the Court of Appeal of Northern Ireland that in the absence of any damage caused to the drawer by the delay he was not discharged by failure to present the cheque in a reasonable time.

Goldman v. *Cox* [2] is a warning to tradesmen and publicans who cash cheques for their customers.

Goldfarb v. *Bartlett* [3] which perhaps deserves a longer note, is to the effect that notice of dishonour of a bill drawn before the dissolution of a partnership if given to a continuing partner after its dissolution binds the retiring partners.

The Scots case of *Brebner* v. *Henderson* [4] (not Harrison as here printed) is an instance of narrow construction of the Act. It illustrates the danger of signing a bill in a representative character without making it abundantly clear that personal liability is not intended. A promissory note was signed by C. D. and E. F., the former described as " Director," and the latter as " Secretary," while above their signatures was written the name of a company. It was held by the First Division that the signatories were personally liable as they had failed to show that the words appended to their signatures were more than descriptive, or that the signatures were appended " for or on behalf of " the company. Lord Sands, while agreeing in the judgment, says : " My impression is that the reading in of the words ' on behalf of ' accords with probable intention." The case is much stronger than *Elliott* v. *Bax-Ironside*.[5]

In a book of this kind in which all the principal cases are referred to several times, it would facilitate reference if the Table of Cases indicated by an asterisk or by black type the page on which the facts are stated. We may venture to suggest also that as the book is used by students not familiar with the forms it would be convenient to give a few specimen bills with acceptances and indorsements.

F. P. W.

THE INSURANCE COMMISSIONER IN THE UNITED STATES.[6]

This massive work is indispensable to students of a branch of law the boundaries of which have yet to be determined but which is of growing importance both to American and to British students : to American students because the application and enforcement of law through administrative agencies rather than through the ordinary Courts is an

[1] Northern Ireland Reports, [1925] C.A. 107.
[2] [1924] 40 T.L.R. 744 C.A.
[3] [1920] 1 K.B. 639.
[4] [1925] S.C. 643.
[5] [1925] 2 K.B. 301 C.A.
[6] *The Insurance Commissioner in the United States.* By Edwin Wilhite Patterson, A.B., S.J.D., Professor of Law in Columbia University. (*Harvard Studies in Administrative Law*, vol. i. Harvard University Press, 1927. $6.00.)

outstanding development of the twentieth century in their country; to British students, in view of the Lord Chief Justice's recent denunciation of "the restless pretensions of bureaucracy to establish in our midst what would be in effect a more arbitrary 'droit administratif' unfettered even by the tribunals, such as they are, which form part of the continental system," and all that that denunciation implies.

As an example of monumental industry and painstaking thoroughness the book must be pretty well unique. In some six hundred pages Professor Patterson traces in minutest detail the organization, personnel, functions, administrative devices, scope of control, procedure and amenability to external control of the insurance departments of the forty-eight States. He has been confronted with the difficulty encountered by every text-book writer who undertakes a subject which is within the purview of State rather than Federal legislation. "In every State of the union, and in the District of Columbia and the territory of Alaska as well, one or more officials are charged with the administration of the laws relating to private insurance undertakings. In every State except Arizona a single official is invested with the general powers and duties of this nature," and it by no means follows that any one State has such a respect for the legislation controlling that official's activities in the neighbouring states, that it is at all inclined to reproduce, either in principle or in detail, the provisions of their statutes. The textbook writer has either to take the legislation of the forty-eight States and endeavour to extract some sort of leading principles from the welter of legislation confronting him, or he has to fall back on a laborious presentation of the differences exhibited by the different statutes. Professor Patterson inclines to the latter method.

In Great Britain such government control as is exercised over insurance companies could be described in a fairly small space. It is one of the multifarious duties of the Board of Trade, although the Home Office lends a hand, in that it keeps an eye on the premiums paid in respect of the insurance of Employers' Liability risk. The Industrial Assurance Commissioner, into which the genial and expansive personality of the functionary who was the Chief Registrar of Friendly Societies blossomed in 1923, more nearly resembles the Insurance Commissioner of the United States, although his jurisdiction extends to but one branch of insurance as compared with the general jurisdiction of the latter; but, needless to say, the method by which the British official is appointed has nothing in common with the United States method, where, as Professor Patterson tells us, the Commissioner "is usually chosen chiefly for political reasons, and is almost invariably a party man."

The powers of the United States Commissioners are pretty drastic, as appears from the statement that they are in every State "authorized to 'examine' insurance companies, which includes the inspection of their books, papers and securities, and the oral questioning of their officers and agents," duties which necessarily must be delegated, some-

times apparently with results which provide the Lord Chief Justice and other critics with "horrible examples" of the evils of administrative law and read like an O. Henry story. "An executive official of a life insurance company, having its home office in Chicago, relates the following incident: A number of years ago a stranger came into the home office and presented an authorization from the insurance superintendent of a State several hundred miles away, empowering him to examine the company's records as to gross premium receipts from that State. The official detailed a clerk to produce the books and records required for the examination and invited the stranger to go to work. . . . He appeared in the afternoon and started to work, but finally revealed that he was wholly unacquainted with that kind of work. Then he became confidential.

"'I am not a regular employee of the insurance department,' he explained, 'but—the superintendent is a good friend of mine and when I told him that I had to make an expensive trip to Chicago on business, he offered to give me a commission to examine your books, so that I could get my expenses paid.'

"The official had a clerk draw off the items in question and hand the summary to the 'examiner.' Later, the company paid this 'examiner's' bill for expenses."

Nevertheless, the impression conveyed by Professor Patterson's book is that the work of the Insurance Commissioners is on the whole tolerably well done; and that their standard of efficiency is gradually improving.

C. M. K.

THE PRACTICE OF THE PRIVY COUNCIL IN JUDICIAL MATTERS.[1]

THE second edition of this very useful book will be welcomed by the profession. In its preparation the author, who is Attorney-General of Palestine, has been assisted by his father, Mr. Herbert Bentwich of the Inner Temple. The first edition was rather out of date owing to the issue of fresh rules, a risk to which works of this kind are peculiarly exposed.

The book has been thoroughly revised and a good deal of the historical matter has been cut out. It gives all the rules in force and a selection of forms, and is altogether a most workmanlike volume.

F. P. W.

BRITISH NATIONALITY.[2]

M. KIEFÉ has given us a remarkably clear and able study of British nationality. In addition to the more obvious sources, the author has studied the literature dispersed in legal periodicals, and he gives a useful bibliography.

F. P. W.

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